ERA
Academy of European Law

Documentation

LITIGATION FOR LAWYERS

417DT12 Trier, 15-16 February 2017

Co-funded by the Justice 2014-2020 programme of the European Union

Table of contents

Litigating European Union Law

ERA Seminar

15 – 16 February 2017

1

THE JUDICIAL SYSTEM OF THE EUROPEAN UNION

Composition, organisation and competences of the Court of Justice of the European Union. The reform of the General Court

Christian Gänser
Legal Secretary, Court of Justice*
Chambers of Judge Jean-Claude Bonichot

* The views of the speaker reflect his personal opinion

2

I. The Court of Justice – a Timeline

One mission since 1952:

"ensure that in the interpretation and application of [the Treaties] the law is observed"

Three core tasks throughout the time

The Court of Justice of the European Union:

I. reviews the legality of the acts of the institutions of the European Union,
II. ensures that the Member States comply with obligations under the Treaties,
III. and interprets European Union law at the request of the national courts and tribunals.

3

One institution – historical development

1952: the Court of Justice of the European Coal and Steel Community

© Court of Justice

- 7 Judges from the 6 founding states (France, Germany, Italy, Luxembourg, Netherlands, Belgium)
- Seated in the Villa Vauban
- 2 Advocates General
- First judgments: 21st December 1954:

- *France v High Authority* (1/54, EU:C:1954:7)
- *Italy v High Authority* (2/54, EU:C:1954:8)

1957: European Economic + European Atomic Energy Communities

4

Back in 1952…

© Court of Justice

5

1988: Creation of the Court of First Instance

2004: Establishment of the Civil Service Tribunal

2009: Name changes

"Court of Justice of the European Communities"

-> **"Court of Justice of the European Union"**

composed of:

1. *Court of Justice*
2. *General Court*
3. *Civil Service Tribunal*

2015: Reform of the General Court

2016: Suppression of the Civil Service Tribunal

6

II. One Institution – Two Courts

The Court of Justice of the European Union

1. The Court of Justice
2. The General Court

© Court of Justice

7

1. The Court of Justice

- **28 Judges**
  - One judge per Member State
- **11 Advocates General**
  - 6 “permanent” positions: FR, DE, GB, IT, ES, PL
  - 5 “rotating” positions, currently held by: CZ, DK, SV, BE, BG
- **“Terms and Conditions”:** Article 19 TEU / Articles 253-255 TFUE
  - Renewable terms of 6 years
  - Persons “whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence”
  - Consultation of the “Article 255” panel
  - Appointed by the Member States – common accord

8

2. The General Court

- **At least one judge per Member State** (Article 19 TEU)
  Article 47 of the Statute:
  - 40 judges as from 25th December 2015
  - 47 judges as from 1st September 2016 (44 currently in office)
  - 2 judges per Member State as from 1st September 2019 (56 judges)
- **Advocates General:** Article 49 of the Statute
- **"Terms and Conditions":** Article 19 TEU / Articles 253-255 TFUE
  - Renewable terms of 6 years
  - Persons "whose independence is beyond doubt and who possess the ability required for appointment to high judicial office"
  - Consultation of the "Article 255" panel
  - Appointed by the Member States – common accord

9

III. Behind the Scenes

The Court of Justice of the European Union is composed of its Members and supported by its staff:

- Approx. 2 122 posts (civil servants, temporary and contract agents)
  - 1 285 women
  - 837 men

The different "Services" of Court of justice of the European Union

1. 2 Registrars (Court and General Court)
2. Common Administration/technical support
3. Linguistic Services
4. Library and Research
5. Judges' Offices

10

1. The Registries

- Maintaining the case-files for pending cases
- Keeping the register (procedural documents)
- Receives, keeps and distributes all procedural documents sent to the Court/General Court
- Responsible for all correspondence relating to the proceedings before the Court/General Court
- The Registrar of the Court manages the institution's departments under the authority of the President of the Court

3. The Linguistic Services - Directorate General for Translation

- 1 000 posts = 47 % of the Institution's staff
- 625 lawyer linguists
- 75 interpreters
- 24 official languages
- 552 language combinations
- Translation work currently exceeds *1 000 000* pages per year

11

4. Library and Research

- **The Library**
  - Works on EU law, international law and comparative law,
  - Works on the national laws of all the Member States and certain non-member countries
  - Approx. 230 000 volumes

- **The Research and Documentation Directorate**
  - Lawyers covering all the Member States' legal systems
  - 3 main missions:

    a. Analysis of incoming cases (mostly requests for preliminary rulings)
    b. Elaboration of comparative law resources for the two courts
    c. Legal analysis – summarisation and indexing of judgements

12

5. Judges' Chambers

Each member of the two Courts is assisted by his staff

- Up to 4 legal secretaries – "*Référendaires*"
  - Lawyers from all member states of the EU with various legal backgrounds and experiences
  - Tasks include, notably:
    - Preparation of case files and various legal documents
    - Drafting of Preliminary Reports
    - Assist at hearings
    - Drafting of Judgements and Conclusions
  - Legal secretaries are excluded from deliberations

- 2 or 3 Assistants
- Possibility to offer internships

13

IV.Competences

The Court of justice of the European Union:

- reviews the legality of the acts of the institutions of the European Union,
- ensures that the Member States comply with obligations under the Treaties,
- and interprets European Union law at the request of the national courts and tribunals.

For that purpose, the General Court (1.) and the Court of Justice (2.) have different competences which are divided mainly according to the different type of actions and legal remedies and procedures.

The actions, remedies and procedures before the two courts concern all possible areas of life (3.).

14

1. The general Court's jurisdiction

a) Direct actions brought by natural or legal persons for annulment of acts of the institutions, bodies, offices or agencies of the EU, including litigation of civil servants of the EU

b) Actions brought by the Member States against the Commission

c) Actions brought by the Member States against the Council relating to acts adopted in the field of State aid, trade protection measures

d) Actions seeking compensation for damage caused by the institutions or the bodies, offices or agencies of the EU or their staff

e) Actions based on contracts made by the EU which expressly give jurisdiction to the General Court

15

2. The Court's jurisdiction

a) References for preliminary rulings

b) Actions for failure to fulfil obligations

c) Actions for annulment brought by a Member State against the European Parliament and/or against the Council (apart from Council measures in respect of State aid, dumping and implementing powers) or between EU institutions

d) Actions for failure to act

e) Appeals against decisions from the General Court

16

3. Relevant Areas of Law

- Access to documents, Inter-institutional litigation
- Harmonisation, Taxation
- Area of freedom, security and justice, Judicial cooperation in civil and criminal matters, Asylum, Border control
- Foreign and security policy
- EU Citizenship, Consumer protection, Health, Social policy, Social security for migrant workers
- Free movement of goods, capital and persons, Freedom of establishment and to provide services
- Commercial policy, Fisheries policy, Agriculture
- Company law, Competition, Intellectual property, Anti-Dumping
- Economic and monetary policy, Financial Supervision
- Energy, Environment , Network Enterprises, Transport
- EU Budget, Customs
- Public procurement, State aid

17

V. Judicial Organisation

The Court and the General Court sit as full courts or in chambers

- The Court may sit as a full court ("*Assemblée plénière*"), in a Grand Chamber of 15 Judges or in Chambers of three or five Judges.

- The General Court usually sits in chambers of three or five Judges; the rules of procedure also provide for a Grand Chamber and a single judge.


© Court of Justice

18

VI. Statistical Overview – Caseload and Output

1. 2015 general figures:

- 1 711 cases were brought before the three courts
- 1 755 cases completed

a) The Court of Justice

- 713 new cases
- 616 completed cases
- 884 cases pending

b) The General Court

- 831 new cases
- 987 completed cases
- 1267 cases pending

c) The Civil Service Tribunal

- 167 new cases
- 152 completed cases
- 231 cases pending

19

2. The Most Important Numbers

a) At the Court

- 436 New references for preliminary rulings introduced (61,15 %)
- 206 New appeals (28,89 %) – 27 % of the General Court's decisions

- Average duration of proceedings:
  - Approx. 15 months for preliminary rulings
  - Approx. 14 months for appeals

b) At the General Court

- 332 new actions for annulment (various subjects – 39,95 %)
- 302 new actions in the field of intellectual property (36,34 %)

- Average duration of proceedings:
  - Approx. 47 months for competition cases
  - Approx. 18 months for IP

- 27 % of the decisions were challenged (appeal before the Court)

20

VII. The reform of the General Court

Challenges for the General Court

- **Caseload**
  - Fewer than 600 new cases before 2010
  - 1270 pending cases at the end of November 2015
  - Developing competences of the EU (e.g. the Banking Sector)
- **Duration of proceedings**
  - Deliver judgments within a reasonable time
  - Respect of Article 47 of the Charter of Fundamental Rights
  - Claims for damages: 10 January 2017, T-577/14, Gascogne v EU
- **Quality of judgements**
  - Maintain the high quality of the General Court's decisions
  - Only 27 % of the decisions are challenged

21

Thank you for your attention!

22

Litigating EU Law: The Judicial System of the European Union

Noel J. Travers, *Senior Counsel*
Bar of Ireland
'Proceedings before the CJEU'
ERA, Trier, 15 February 2017

Overview of the proceedings before the CJEU

- Actions for annulment
- Actions for failure to act
- Preliminary ruling proceedings
- Actions for damages
- Infringement proceedings

Outline – Review of legality

- What is review of legality?
  Judicial review in EU law context, essentially Article 263 TFEU
- Ability of Member States, Union institutions, bodies, as well as natural or legal persons (including sub-member State regional governments/bodies) to challenge the validity of acts of the Union institutions, as well as acts of bodies, offices or agencies of Union, intended to produce legal effects, before the CJEU.
- Challenges may also be made at national law using applicable national judicial review/administrative law remedies, which challenges may result in a preliminary reference to the CJEU

Review of legality # 2

- Four key questions:

1. Which bodies are open to review?
2. What acts of those bodies can be reviewed?
3. Who has standing to take a review? and
4. On what grounds can they review the act in question?

Which bodies are open to review

- Art 263(1)

  Council

  Commission

  ECB

  Parliament

  European Council

  Bodies, offices or agencies of the Union

What can be challenged?

- Art 263(1) TFEU
  Legislative acts
  Other acts intending to produce legal effects

- General rule
  Can challenge any measure the legal effects of which are binding
  And are capable of bringing about a change in a legal position

- Case 22/70 *ETRA* case
  Commission sought to challenge negotiating procedure adopted by the Member States
  Held: Procedure designed to lay down a course of action
  Was binding on Member States
  Was open to challenge

What can be challenged? # 2

- Case 60/80 *IBM v Commission*

  Commission wrote letter to IBM notifying it of competition law proceedings

  Was the act of the Commission open to challenge?

  Held: Look at substance and not form

  1. Does the measure produce a binding legal effect?

  2. Are those effects such that the applicant's legal position is altered?

  If yes, act is open to challenge

  Here act was not open to challenge

Standing & Art. 263 TFEU

- Privileged applicants

  Automatic right to challenge

- They are

  Commission

  Council

  Parliament

  Member States

  Private individuals to whom acts are addressed

Standing & Art 263 # 2

- Quasi – privileged applicants

  The Court of Auditors

  European Central Bank

  Committee of the Regions

- Limitation on standing

  Standing to challenge any qualifying act which affects their area of interest

Standing & Art. 263 # 3

- All other parties = Art 263, para (4)
  Non-privileged applicants

"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

Non-privileged applicants

- Three questions of Treaty interpretation
  Direct concern
  Individual concern
  Regulatory act
- Two scenarios for an non-privileged applicant
  Challenge to a regulatory act
  Challenge to other acts

Non-privileged applicants # 2

- Challenge to a regulatory act
  Only need to prove direct concern
- Challenge to other acts
  Need to prove direct concern and individual concern
- A lower threshold for regulatory acts

A regulatory act

- Case C-583/11 *P Inuit Tapiriit Kanatami and Others v EP & Council*

  Held: regulatory acts refers to *all acts of general application other than legislative acts*

- Hierarchy of laws

  TFEU, TEU and the Charter

  General principles of EU

  Legislative acts

  Delegated acts

  Implementing acts

Art 263, para (4)

- Direct concern

  Does the Act affect their legal position?

  Easy to satisfy

- Individual concern

  Must be differentiated from all other persons &

  singled out by the 'act' at issue: a very strict test.

- Craig and de Burca

  "*Can the applicant show they are different from all other persons and by reasons of this difference have been singled out in the same way as the addressee?*"

Direct concern

- Case 222/83 *Municipality of Differdange v Commission*

  Measure: Commission decision authorising Luxembourg to give state aid to steel firms on condition they reduced capacity

  Challenged by: Municipality

  Direct concern: Closing of firms would reduce employment and revenue

  Held: Wide margin of discretion given to Luxembourg

  Particular firms not identified in decision

  Therefore not of direct concern

Individual concern

- Case 15/62 *Plaumann v Commission*

  German state sought to have duties imposed on clementines imported from non-MS suspended

  Commission refused

  Applicant = third party

  Did they have standing to challenge refusal?

  Held: Individual concern = restrictive definition

  Does applicant have attributes peculiar to them?

  Are they differentiated from all other persons?

  Anyone can import clementines

  Plaumann of an open category of trader

Quote from *Plaumann*

Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of *certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.* **(The test)**

In the present case the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practised by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee. **(Application of the test)**

Individual concern

- CJEU's rationale
  - Floodgates
  - Treaty interpretation
- Closer examination of problem created by strictness of individual concern test will occur in this afternoon's session on direct actions

Attempts at reform

- Case C-309/89 *Codorniu v Council*

Measure: Council **regulation** limiting use of term cremant to French sparkling wines

Applicant: Spanish producer with "*Gran Cremant*" trademark

Held: Measure was a regulation

Anyone could make cremant

But registration of trademark separated out plaintiff from all other producers

Was individually concerned

Attempts at reform # 2

- Case C-50/00 P *UPA v Council*

AG: Test is unfair

New test: Does act have a substantial adverse effect on plaintiff's interests?

Rationale: Allow true right of direct access to CJEU

Leading to an effective judicial remedy

Held: No – not possible with Treaty amendment

Traditional test upheld

Grounds for Review

- Article 263, para(2) TFEU:

"*It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or* ***of any rule of law relating to their application****, or misuse of powers.*"

Grounds for Review

- Lack of competence
  The principle of conferral
- Not frequently successful
  Broad competencies of Art 114 and 352 TFEU
  Broad interpretation by the Courts
  General caution by the institutions but there are notable exceptions: case C-361/14 P *Commission v McBride & others*

Grounds for Review # 2

- Essential procedural requirement
  Two elements: Institutional procedures
  Procedural rights
- Institutional procedures
  Ordinary legislative procedure
  Role of the European Parliament
  Case 138/79 *Roquette Frères v Council*

Grounds for Review # 3

- Procedural rights
  The right to be heard
  The right to consultation
  The duty of the institution to give reasons for a decision
- Misuse of powers
  Rarely used

Article 265 TFEU

- Focuses on failure to act of institution, or in relevant cases a body, office or agency of the EU to act, where failure amounts to an infringement of the Treaty
- An action will only be admissible where the institution (or body, office or agency) has:
  - first been called upon to act; and
  - has not within two months "*defined its position*"

Art. 265 TFEU # 2

- Who can bring action for failure to act?
  - Commission
  - Council
  - Parliament
  - Member States
  - Para. 3; "*Any natural or legal person may … complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other that a recommendation or an opinion*"
  - Case C-107/91 *ENU*; standing requirements must be met by applicant with re. to act s/.he or it wishes to obtain.

Consequences of illegality or failure to act

- Article 266, para (1), TFEU:

"*The institution whose act has bene declared void or whose failure to act has been declared contrary to the treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union*"

- Obligation is without prejudice to any that may arise to pay damages under Article 340, para, (2) TFEU.

Preliminary reference procedure

- For what does Article 267 TFEU provide?
- National courts and Art. 267
  Definition of a "*court or tribunal*"
  The mandatory duty on 'courts of final Instance'.
- Power to refuse a reference
- Problems associated with Art. 267

Art 267 (1st to 3rd paras)

"*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any ***court or tribunal*** *of a Member State, that court or tribunal may, if it considers that a decision on the question is* ***necessary to enable it to give judgment****, request the Court to give a ruling thereon.*

Where any such question is raised in a case pending before a court or tribunal of a Member State ***against whose decisions there is no judicial remedy under national law****, that court or tribunal* ***shall*** *bring the matter before the Court.*"

Importance of Article 267

- Article 19(1) TEU
  It shall ensure that in the interpretation and application of the Treaties the law is observed
- Article 267
  Cornerstone of EU's legal order
  Central to the development of a modern EU
  A question referred by a national court to the CJEU
  The CJEU answers the question asked
  Not an appeals system

Precedent

- Supremacy

  Case 6/64 *Costa v ENEL*

  Changed the relationship between EU and national law and, thus, between CJEU and national courts

  Forged a bilateral relationship of co-operation which is hierarchal only insofar as ruling on EU law given by CJEU is binding

- Two categories questions can be referred

  Validity of EU law

  Interpretation of EU law

Binding nature # 1

- Validity of EU law

  Asking the CJEU to strike down legislation of the Institutions

- Case 66/80 *ICC*

  Held: Declaration of invalidly binding across the entire EU

- Interpretation of EU law

  Are the rulings of the CJEU addressed to one Member State binding of all Member States?

Binding nature # 2

- Cases 28-30/62 *Da Costa*

  Held: CJEU answered a question by giving the same judgment it gave is a previous case

- Case 238/81 *CILFIT*

  Held: National court could rely of prior CJEU rulings

- Case C-231/06 *NPO v Jonkman*

  Held: National authorities, including the courts, have an obligation to ensure that EU law is complied with

"*court or tribunal*"

- Definition is a matter of EU law
  Allows for uniformity
  Prevents abuse by Member States
- The definition
  No formal definition
  A set of characteristics that the body MAY have

"court or tribunal" # 2

- Formalised essential criteria in Case C-54/96 *Dorsch Consult*
  - Established by law
  - Permanent
  - Jurisdiction is compulsory
  - Procedure is *inter partes*
  - Applies rules of law
  - **Decisions of a judicial nature**
  - **Independent**

"court or tribunal" # 3

- Compulsory jurisdiction
  The decision of the body is binding
  The parties cannot chose an a different body
- Applying the rule of law
  Essential that the body be required to act in a judicial manner

"court or tribunal"

- Decision of a judicial nature
  Judicial v administrative decisions
  High Court as an administrative body
- Independence
  Internal independence
  External independence

What is a "court or tribunal"?

- Case C-516/99 *Walter Schmid*
  Decision of Finance Authority (FA) appealed to income tax appeal chamber.
  Was it a "*court or tribunal*"?

Held: Chamber linked to decision maker
Not sufficiently independent
Members of FA were also members of chamber
Functional link

National courts

- Three scenarios
  Interpretation of EU law before a lower court
  Question over the validity of EU law
  Interpretation of EU law before a court of final instance
- Interpretation– lower court
  Absolute discretion to refer of decision maker
  Is an answer necessary to resolve a dispute between the parties?
  Parties can apply for a reference

National courts

- Absolute discretion of national court
- *Campus Oil v Minister for Energy*

  Irish High Court made reference to CJEU

  Defendant sought to appeal this to Supreme Court

  Held: High Court judge has an untrammelled discretion

  Not subject to the parties or judicial supervision

Discretion of national court

- Case 166/73 *Rheinmuhlen*

  Lower court decision quashed by higher court

  Lower court did not accept ruling and referred question to CJEU

  Was it permissible for lower court to refer a question when higher court had decided substantial case?

  Higher court too referred a question

  Did Art 267 give lower court an unfettered discretion to make a referral?

Discretion of national court # 2

- Case 166/73 *Rheinmuhlen*

  Held: Art 267 essential to ensure uniform application of EU law

  National courts have widest possible discretion if case involved interpretation or validity of EU law

  NPR cannot deprive court of this discretion

  Lower courts can make references that contradict higher court if they feel higher courts are breaching EU law

Discretion of national court # 3

- Rational of the CJEU

  Prioritise references over domestic legal orders & ensure uniform application of EU law

- Right to a reference

  Derived from EU law and not national law

  Lower courts can ignore higher courts

Discretion of national courts # 4

- Case 314/85 *Foto-Frost*

  German court asked to strike down a Commission decision based on an EU regulation

  Held: Aim of Art 267 is uniform application of EU law

  Allowing national court to strike down EU law would lead to a lack of certainty

  Allow Institutions to participate in the case

  Art 263 gives CJEU exclusive jurisdiction to strike down EU law & must make reference when doubts as to validity of EU legislation cannot be dismissed. Are the doubts well founded?

Courts of final instance

- No judicial remedy to its decision
- Case C-99/00 *Lyckeskog*

  No automatic right to appeal decision of Court of Appeal

  But could apply to Supreme Court for leave to appeal

  Was it a court of final instance?

  Held: Object = uniform interpretation of EU law

  Can still be fulfilled at "leave to appeal" stage

  Aim is to prevent a line of authority at a national level contrary to EU law

Courts of final instance

- A mandatory duty placed on senior judges
  Inefficient use of human ability
  Potential for time wasting
- Exceptions
  Reference is not necessary
  Acte Claire
  Act Eclaire

Necessary to decide the case

- From Art 267 itself:
  Some discretion given to judges
  Incorrect use of discretion?
  Case C-224/01 *Kobler v Austria*
- Case 238/81 *CILFIT*
  Held: The necessity threshold applies to courts of final instance in the same way that it applies to ordinary courts

Interim relief

- Delay between reference and CJEU judgment:
  Can national court give interim relief to an applicant?
- Case C-466/93 *Atlanta*
  Held: Yes
  1. Serious doubts about the validity of the EU law and has made a reference
  2. Interim relief is necessary to prevent serious and irreparable damage
  3. Take into account EU interest
  4. Respect any CJEU case law

Acte Claire

- Definition

  There is a question over the interpretation of EU law, but the answer is obvious

- Utilise ability of senior judges

- Avoid undermining the essence of the mandatory duty

Acte Claire # 2

- Case 238/81 *CILFIT*

  Was wool to be considered an "*animal product*" under the an EU regulation?

  Italian court – did it have to refer every question, or only where there was a reasonable doubt?

  Held: Doctrine of Acte Claire created with caution
  Interpretation must be so obvious it leave no room for reasonable doubt

Acte Claire # 3

- Case 238/81 *CILFIT*: Three restrictions placed on courts:
  1. Answer must be equally obvious to CJEU
  2. Answer must be equally obvious to other national courts
  3. EU law has several unique characteristics that must be taken into account
- EU law characteristics

  Multi-lingual legislation, all with equal standing

  Particular terminology

  Legal concepts have different meaning

  Broad, teleological interpretation of EU law

Acte Eclaire

- Definition

  Can rely on a prior CJEU judgement to answer the question

  The doctrine of binding principles of EU law (precedent in virtually all but name)

- Facts of the two cases can be different

  Examine the point of law

  CILFIT

Breach of the mandatory duty

- Case C-224/01 *Kobler v Austria*

  Austrian professors get pay rise after 15 years

  Kobler = 15 years exercising EU rights in Austria

  Supreme Court – decided case against applicant & did not refer a question to the CJEU

  Held: If the breach was "*a manifest infringement*" of EU law applicant could sue State - Member State liability for breach of EU by national supreme court: breach maybe manifest where it involves a breach of the mandatory duty to refer.

CJEU –Declining to answer references

- Case C-210/06 *Cartesio*

  Held: CJEU presumes that the question is relevant given cooperative nature of the procedure

- Four grounds for refusal

  Questions not relevant to the dispute

  Hypothetical problem

  Not enough factual or legal information

  Same question already answered

Question not relevant

- Case C-210/06 *Cartesio*

  Held: Determination of relevance is for the national court

  Limited role of the CJEU in examining the decision to refer by the national court

- Rationale

  A division of labour

  Encourages references

Hypothetical questions

- Threshold

  There must be a genuine dispute between the parties

  Question must be relevant to this dispute

- *Foglia v Novello*

  Applicant an Italian exporter of wine

  Respondent a French importer

  Complicated contractual arrangement leading to a challenge to French import duty

Hypothetical questions # 2

- Case 104/79 *Foglia v Novello*

  Held: The contractual arrangement was designed to trigger a reference

  There was no actual dispute between the parties

  CJEU will not issue advisory opinions

  The question was refused

- Criticism of CJEU

  CJEU made findings of fact and declined reference second time when national court maintained its reference in Case 244/80 *Foglia v Novello* No. 2

Centrality of Judicial Review & Preliminary Reference Procedure to EU Legal Order

- Treaty has established, by Articles 263 and 277, on the one hand, and Article 267, on the other, a complete system of legal remedies and procedures designed to ensure judicial review of the legality of European Union acts, and has entrusted such review to the Courts of the European Union. Accordingly, natural or legal persons who cannot, by reason of the conditions of admissibility stated in the fourth paragraph of Article 263 TFEU, challenge directly European Union acts of general application do have protection against the application to them of those acts. Where responsibility for the implementation of those acts lies with the EU institutions, those persons are entitled to bring a direct action before the Courts of the European Union against the implementing measures under the conditions stated in the fourth paragraph of Article 263 TFEU, and to plead, pursuant to Article 277 TFEU, in support of that action, the illegality of the general act at issue.

Centrality of Judicial Review & Preliminary Reference Procedure to EU Legal Order # 2

- Where that implementation is a matter for the Member States, such persons may plead the invalidity of the European Union act at issue before the national courts and tribunals and cause the latter to request a preliminary ruling from the Court of Justice, pursuant to Article 267 TFEU.
- It follows that requests for preliminary rulings which seek to ascertain the validity of a measure constitute, like actions for annulment, means for reviewing the legality of European Union acts.

Actions for damages

- Art. 268: CJEU "*shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340*".
- Art. 340, para (2) addresses "*non-contractual liability*" of the Union. It:
  - "*shall, in accordance with the general principles of law common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties*"

Actions for damages # 2

- Time limit governed by Statute; will run for up to five years until all the requirements for liability, and especially the existence of damage, have materialised. Where damage is continuous and occurs on a daily basis, a claim can be brought with regard to consecutive periods
- Autonomous from of review of legality remedy; standing requirements inapplicable unless effect of what is sought seeks to achieve exactly what could have been obtained through an Article 263 action

Actions for damages # 3

- Only remedy open to CJEU is to make an award of monetary compensation
- Any finding that act at issue is unlawful will be incidental to meeting the criterial for such an award. Thus, availability of action for damages does not operate to deprive an individual from seeking nullity of act at issue through a review of legality if s/he/it can satisfy standing reqs., & time limits of Art. 230

Actions for damages # 4

- Applicable criteria since Case C-352/98 *Bergaderm* are those of the test for Member State liability under *Brasserie du Pêcheur*, *i.e.* a sufficiently serious breach of a rule of law
- *This will require:*
  - *The existence of damage;*
  - *A causal link between the damage caused and the conduct alleged against the institution;*
  - *The illegality of that conduct.*

Infringement actions; Articles 258-260

- Role of individual complaint; any individual can complain to the Commission where they believe MS is not complying with EU law
- Two step enforcement procedure

  Art 258 (or Art. 259) – declaration

  Art 260 – lump sums &/or penalty where Art. 258 (or Art 259) judgment not complied with
- Both articles envisage an administrative & a judicial procedure

Individual complaint

- Procedure

  Write a letter to relevant DG with details

  Or fill out form
- Advantage

  Cost effective
- Disadvantage

  Complainant has no procedural rights

  Will not achieve individual justice

Individual complaint # 2

- Case 247/87 *Star Fruit v Commission*

  Complaint about banana market in France

  Art 263 challenge to Commissions refusal to act

  Held: Commission has absolute discretion
- Case T-191/99 *Petrie v Commission*

  Individuals made complaint to Commission about Italy

  Sought documents submitted to Commission by Italy

  Held: No procedural rights

  No access to documents

Administrative Procedure

1. Letter of Formal Notice (LFN)
   Outline of the infringement
2. Member State reply
   How national law complies with EU law
3. Reasoned Opinion (RO)
   More detailed complaint. Time limit for MS action
4. Member State reply

Administrative Procedure # 2

- Time limit of is usually 2 months
- Absolute discretion of Commission at all times
- Member State – a right to fair procedures
  Right to make submission in response to LFN
  Right to bring infringement to an end
  Cannot change complaint from LFN to RO to court case

Judicial procedure

- Role of the CJEU
  Determine, objectively, if MS has failed in its obligations
- Timing of assessment
  Deadline in RO
  All subsequent changes ignored
- Outcome
  A declaration
  Except if Art 260(3) applies

Art 260(3) & non-notification of measures transposing certain Directives

- Specific Treaty of Lisbon introduced change
- Deals with non-implementation of a directive
  - Fine suggested by Commission at Art 258 stage
  - Court to impose fine not exceeding Commission suggestion
- Easiest breach to prove

Art 260(2) - Fines

- Commission applies to the CJEU to impose fine
  Commission suggests fine but Court has discretion
- Calculation of fines
  €600 per day
  x (1-20) depending on the seriousness of breach
  x (1-3) depending on duration of infringement
  x (State's ability to pay)
- Court can accept/vary fine
  Daily fine or lump sum payment

Art 260 – Fines procedure

- Shorter procedure that Art 258
  LFN, court
  Post Lisbon change – RO dropped
- Time
  Comply with declaration by the time set in RO under Art 258
  Compliance after and a fine can still be levied
- *Commission v Italy*
  Held: Fine levied even though laws were repealed

MS responsibilities

- Three possible breaches by MS
  - Failure to cooperate with Commission
  - Failure to implement a directive
  - Failure to enforce obligations under EU law
- Defendant
  - As MS, will (as represented by its government) be responsible for all organs of state & potentially even for private parties
  - Cannot rely upon internal constitutional arrangements to avoid liability

The preliminary reference procedure – Practical advice for lawyers

URÍA MENÉNDEZ

Daniel Sarmiento
Uría Menéndez / Universidad Complutense de Madrid
Trier, 15 February 2017

Ciudad, Fecha – cuerpo 20

Contenido

URÍA MENÉNDEZ

URÍA MENÉNDEZ

1 Requesting a reference

URÍA MENÉNDEZ

1 Requesting a reference

1. A link with EU Law
2. A “jurisdiction”
3. First or Last Instance Court
4. Interpretation / Validity
5. Making a case
    1. The main argument or simply one more
    2. Proposing a question for reference
    3. Challenging a Parliamentary Act

URÍA MENÉNDEZ

2 The questions referred

URÍA MENÉNDEZ

2 The questions referred

1. A chance to influence in the questions referred
2. What if you do not agree with the questions referred?
3. What if you do not agree with the answer proposed by the referring court?
4. Appeals against the order for reference
5. Withdrawal of the reference

URÍA MENÉNDEZ

3 Procedures involved

URÍA MENÉNDEZ

3 Procedures involved

1. The urgent preliminary procedure
2. The expedient procedure
3. Art. 99 RP
4. References before the General Court?

4 The written procedure

URÍA MENÉNDEZ

URÍA MENÉNDEZ

4 The written procedure

5. Observations to the court
6. No reply – All submissions at a single time
7. Joining of procedures
8. Fast-track references: art. 99 RP
9. Questions to the National court
10. Practical tips
    1. e-curia
    2. length and style
    3. the “language” of the Court
    4. time-limits

URÍA MENÉNDEZ

5 The oral phase

URÍA MENÉNDEZ

5 The oral phase

1. The hearing
    1. Language
    2. Structure
    3. Questions from the court
2. The opinion of the advocate general
3. Reopening of the oral procedure
4. Practical tips
    1. Preparing your trip
    2. Arriving at the Court
    3. The preliminary hearing
    4. Speed and Clarity

URÍA MENÉNDEZ

6 The judment of the Court

URÍA MENÉNDEZ

6 The judgment of the Court

1. Personal scope
2. Territorial scope
3. Temporal scope
4. Limitation of effects
5. Res iudicata?

URÍA MENÉNDEZ

7 Conclusion

URÍA
MENÉNDEZ

THANK YOU!

www.uria.com

BARCELONA · BILBAO · LISBOA · MADRID · PORTO · VALENCIA · BRUXELLES · FRANKFURT · LONDON · NEW YORK · BOGOTÁ · BUENOS AIRES · LIMA · CIUDAD DE MÉXICO · SANTIAGO DE CHILE · SÃO PAULO · BEIJING

Bird & Bird

Direct actions before the General Court

"Litigating European Union Law" Seminar

Academy of European Law, Trier

15 February 2017

Marianna Rantou

Bird & Bird LLP, Brussels

Table of contents

Bird & Bird

Section I – Theoretical background

Bird & Bird

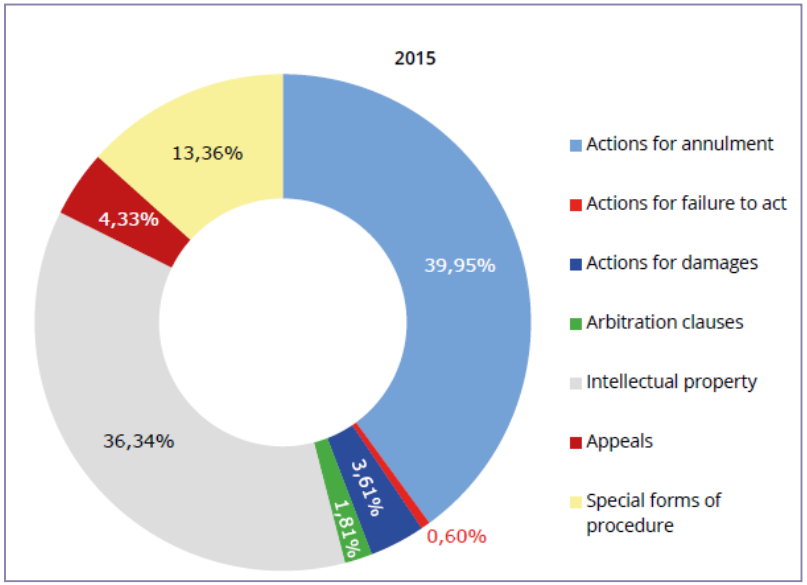
1. Which types of action?

- Actions for Annulment (Article 263 TFEU)
  → most common type of action/
  the main subject of this presentation

- Other types of action:
  - Actions for a Failure to Act (Article 265 TFEU)
  - Actions for Damages (Article 268 and 340 TFEU
  - Staff cases (Article 270 TFEU)
    (previously Civil Service Tribunal, now General Court)
  - Contractual liability (Article 272 TFEU)
    (only where there is an arbitration clause in a contract)
  - Actions relating to intellectual property
    (brought against the Office for Harmonisation in the Internal Market)

- Infringement Proceedings (Articles 258-260 TFEU)
  → Action against EU Member States before the Court of Justice
  (not addressed in this presentation)

New cases 2015:
Type of action (General Court)



Source: CJEU Annual Report 2015:
Judicial activity (General Court) p. 167

Bird & Bird

2. Where to bring an action? (jurisdiction)

Article 256, paragraph 1 TFEU (& Article 51 of CJEU Statute):

"The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding."

The General Court:

- At least one judge from each Member State
  (44 judges in office as at 19 September 2016 - term of office is six years, renewable)
- Unlike the Court of Justice, the General Court does not have permanent Advocates General
  However, that task may, in exceptional circumstances, be carried out by a Judge of the General Court
- Chambers of five or three Judges or, in some cases, a single Judge. It may also sit as a Grand Chamber (fifteen Judges) when justified by legal complexity or importance of case (extremely rare)
- The General Court has its own Registry
  But it uses the administrative and linguistic services of the CJEU for its other requirements
- Applicable Procedural rules:
  - Statute of the Court of Justice (common with the CJEU); but
  - Rules of Procedure of the General Court and Practice directions.

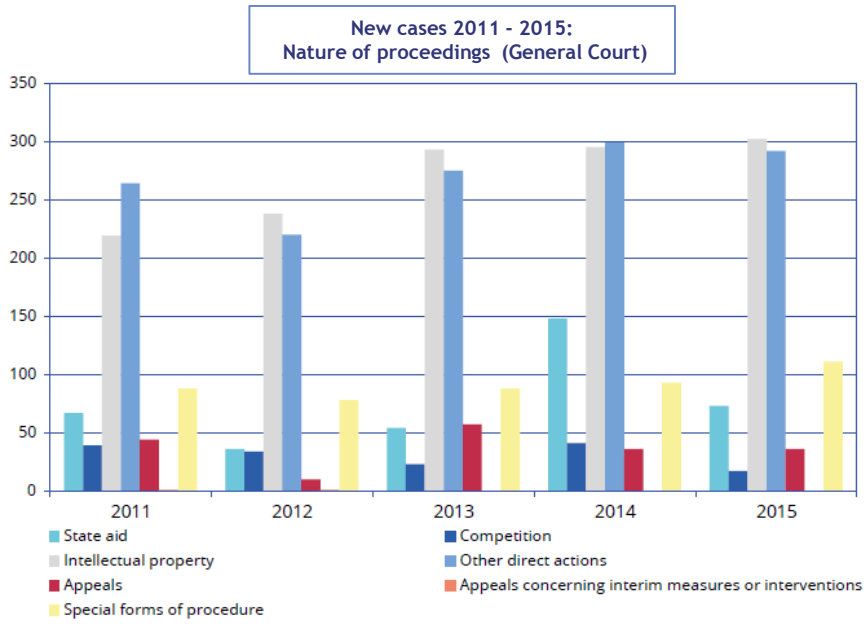
3. What acts can be challenged?

Article 263, paragraph 1 TFEU:

"The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties."

- Binding act (not only form (Article 288 TEFU) but content) - Not acts of contractual nature
- Act intended to produce legal effects (*IBM* case law) - Not confirmatory acts

- Some examples of reviewable acts in:
  - Antitrust
  - Merger control
  - Public tendering procedures
  - State aid
  - Access to documents (Regulation 1049/2001)
  - Restrictive measures (external action)
  - Law governing the institutions



Source: CJEU Annual Report 2015: Judicial activity (General Court) p. 166

Bird & Bird

4. Who can bring an action? (*locus standi*)

Article 263, paragraph 4 TFEU:

"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

A. Natural or legal persons ("non-privileged applicants"):

- General rule: the contested act is addressed to the applicant **or** it is of "*direct and individual concern*" to them:
  - Must prove separately "*direct*" and "*individual*" concern – case law
    - *Plaumann* (Case 25/62)
    - *Inuit* (C-583/11 P)
- Interest to bring proceedings (personal; vested and present)

B. Privileged applicants (Article 263, second paragraph TFEU): *"actions brought by a Member State, the European Parliament, the Council or the Commission"* – no requirements

C. Semi-privileged applicants (Article 263, third paragraph TFEU): *"under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives"* – requirement: protecting their prerogatives

5. Why bring an action? (grounds for annulment)

Article 263, paragraph 2 TFEU:

"[…] on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers."

- Review of the General Court is limited to the legality of the contested act

- Four grounds (but broad interpretation):
  1. Lack of competence (e.g. legal basis, delegations of powers)
  2. Infringement of an essential procedural requirement
     (e.g. requirement to state reasons (Article 296 TFEU), requirement to hear the addressee, requirement to consult)
  3. Infringement of Treaties/ rule of law (e.g. breach of EU law, Charter, fundamental principles)
  4. Misuse of powers

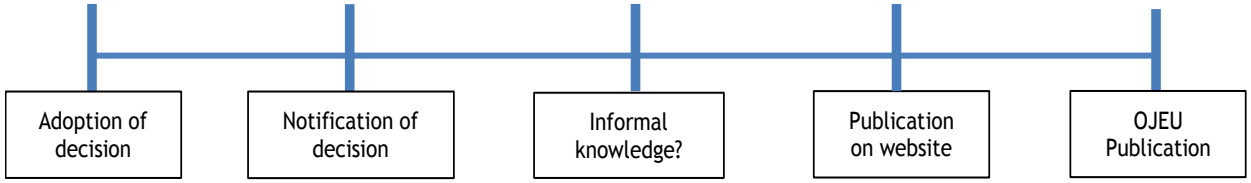
- The General Court can raise on its own motion:-
  - Lack of competence
  - Breach of essential procedural requirement

6. When to bring an action? (time-limits)

Article 263, sixth paragraph TFEU:

"The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

- Two months *(+ ten days on account of distance) (+ 14 days when published in the OJEU)* from:
  - Publication (if applicable); or
  - Notification (if addressee); or
  - Knowledge (subsidiary criterion)



- Court examines also on its own motion
- Calculation of time-limits is key:
  - **Check:** start date, end date (*attention to end date falling on weekends/ official holidays for the Court (not judicial vacations!))
  - First calculation of months, then days (weekends, official holidays, judicial vacations are included as part of the calculation)

Bird & Bird

Section II – Practical approach
(How to bring an action)

Bird & Bird

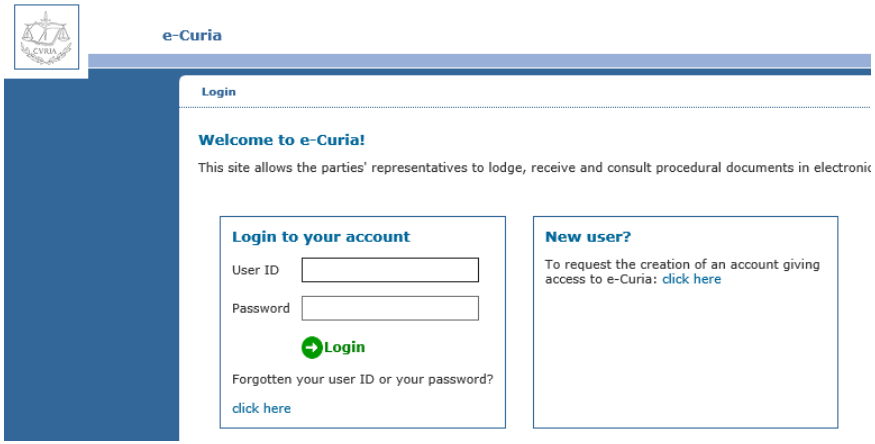
Introductory remarks (I)

- **Represented by a lawyer**

  Article 19 of the CJEU Statute: Lawyers authorised to practice before courts of EEA countries and University teachers: Irrespective of seniority / ability to appear before highest courts of respective Member State – lawyer cannot represent himself

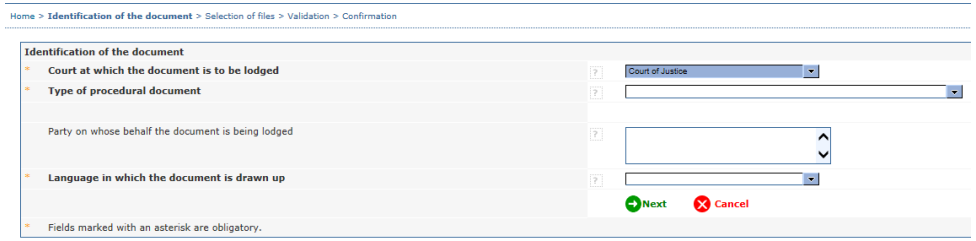
- **Choice of language**
  - any of the official languages of the EU
  - choice of the client/ lawyer
  - same language throughout the written and oral procedure (*but: keep in mind that everything is translated into French for the Court – nuances might be lost in translation)

- **E-curia**
  - everything in electronic form (.pdf format) - Court actively discourages parties from using paper form
  - lawyer requests to set up an account (easy and straightforward) – available in all languages
  - lawyer lodges documents and accepts service via e-curia (also e-mail notification that new document awaits acceptance/ confirmation of lodgement *but: lawyer's responsibility to check account regularly – document deemed to have been served after seven days from e-mail notification)



← Screenshot from E-curia homepage: https://curia.europa.eu/e-Curia

Screenshot from E-curia "lodge a document" section:



Bird & Bird

Introductory remarks (II)

- **Strict Procedural rules**: CJEU Statute, Rules of procedure, Practice directions

  Everything available on www.curia.europa.eu (Section: *Procedure*) – look out: even rules on numbering of pages and how annexes are presented – case law/ precedent

- **Limited number of pages**
  - 50 pages for direct actions and defence
  - 20/25 pages for other pleadings
  - 40% tolerance according to the Rules
  - Exceptions in cases of complexity

- **Formal documents**: power of attorney, proof of existence in law for legal persons – to be prepared prior to submission

- **Signatures**

  All originals in paper copy must be signed – but submission via e-curia only electronic signature suffices

- **Duration** of proceedings: How long does the whole procedure take?
  - almost two years
  - very recent case law re. damages from excessive length of proceedings (T-577/14, *Gascogne*)

Source: CJEU Annual Report 2015: General Court, p. 30

Bird & Bird

Drafting an action – (I)
Content

- **Necessary content of the application:** Article 76 of the Rules of Procedure of the GC

- **Structure of the application:**
  - **First page: Information on applicant and defendant & title of procedural document**
  - **Table of contents**
  - **Introduction - summary:** what is this case about? summarise factual background, underline legal issue
  - **Factual background:** focus on the relevant facts
  - **Admissibility:** always include an admissibility section, even if minimal – if client not the addressee of the contested act, need in this section to justify direct and individual concern and present and vested interest to bring proceedings
  - **Grounds of appeal:** all grounds of appeal/ pleas should be included in the application – new pleas cannot normally be introduced at subsequent stage
  - **Form of order sought:** caution on the wording and what is actually requested by the Court – the Court cannot give something not asked for; include request for costs
  - **Annexes**: include all necessary supporting evidence – delayed submission of evidence in second round of pleadings or oral hearing needs to be justified – no new arguments in the annex
  - **Date** (but e-curia proof of lodgement will suffice)

Drafting an action – (II)
"Technicalities"

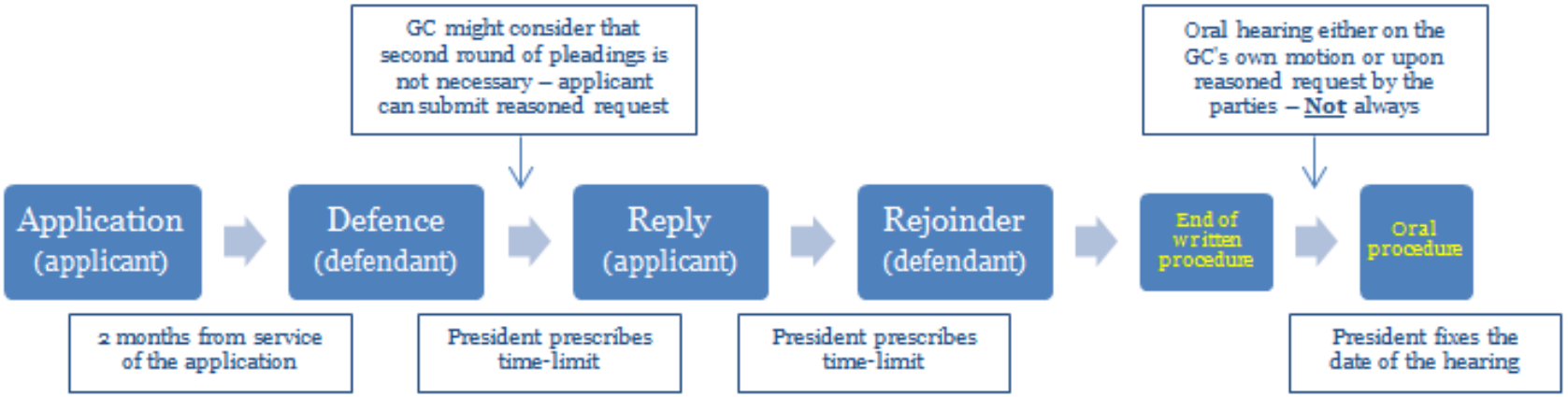
- Consult the practice directions and other soft law instruments available on the curia website for up-to-date guidance
- **Annexes**:
  - contested decision as first annex
  - annexes in language of the case (or at least translated extracts – tolerance when in English or French)
  - no need to include case law or EU legislation in annex
  - include a schedule of annexes on the last page of application (attention to the rules on how to prepare the schedule and how to number annexes per pleading)
  - annexes can be rejected if not compliant with the Rules of Procedure
- **Summary for the OJEU publication**

- **Remember**: possibility of **Regularisation** by the Registrar both of application and the annexes (Article 78(6) of Rules of Procedure and Paragraphs 104-112 of Practice Directions) – if not, could be rejected as inadmissible!

Procedure before the General Court

Written procedure

- Summary notice of action to be published in the OJEU
- The application (and all procedural documents) are served on the defendant by the General Court's Registry
- Timeline of proceedings (possibility to ask for extension to submit a pleading):



- Possibility of intervention (*discussed below*)
- Measures of organisation of procedure or measures of inquiry adopted by the General Court:
  - E.g. questions to the parties; invitation to parties to make written or oral submissions; asking parties to produce information/ documents; oral testimony; commissioning of an expert's report

Bird & Bird

Procedure before the General Court

Oral procedure – before the oral hearing

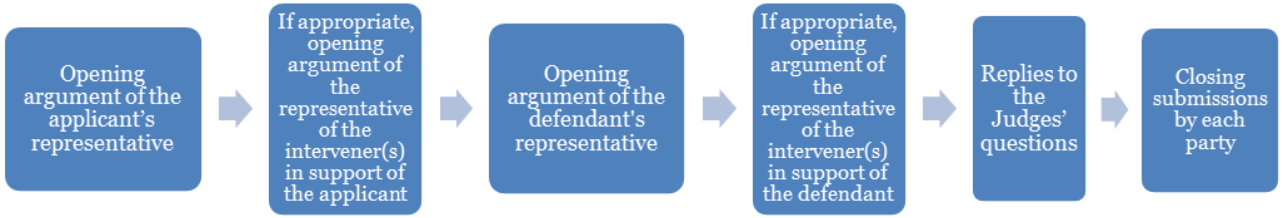
- **Organisation of the hearing**:
  - on the General Court's own motion or upon reasoned request by the parties
  - Notice to attend hearing: normally sent to parties at least one month before hearing takes place
  - General Court can invite the parties to focus on specific issues
  - oral pleadings normally 15 minutes per party – time can be extended upon reasoned request
  - inform the General Court of the names of the lawyer(s) that will attend (possibility for more than one lawyer per party to plead/ reply to questions)
  - consideration of Report for the Hearing – check thoroughly for mistakes – gives an indication of the Judge Rapporteur's approach

- Once the hearing is set – **Preparation for the hearing**:
  - preparation of oral pleadings (in the language of the case): simple, short phrases – avoid idioms, remember that everything is translated
  - rehearse so as to remain within the time set by the General Court
  - prepare possible Q&A – be as thorough as possible, questions can be very persistent, both in law and in fact
  - well-ordered file with hard copies of all the main pleadings – laptop is allowed
  - possibility to send the draft oral pleading to the interpreters in advance, to facilitate translation – or hand copy on the same day to be handed to the interpreters

Procedure before the General Court

Oral procedure – on the day of the hearing

- **The oral hearing:**
  - necessary to wear robe in order to plead (available at the Court, outside the courtrooms)
  - invited to meet the judges right before the hearing, who may ask the lawyers how long they intend to plead, or invite them to focus on a specific question/ issue
  - The parties are seated as follows, seen from the audience:
    - table on the right: applicant's representative(s);
    - table on the left: defendant's representative(s);
    - representative(s) of the intervener(s) generally seated behind the representative of the party supported by the intervention
  - speak slowly and clearly – note dates and case numbers to facilitate the interpreters and avoid mistakes
  - structure of the hearing:



  - be prepared for multiple questions, important not to evade them – questions probably in French (simultaneous translation is provided)
  - possible to convene with other lawyers/ assistants/ your client before answering questions
  - Registrar draws up minutes of the hearing (very brief) – served upon the parties after the hearing

Bird & Bird

Procedure before the General Court
Other procedures (I)

- **Intervention** (Articles 142 *et seq*. of Rules of Procedure)
  - Application for leave to intervene by third party in support of one of the main parties
  - Observations by main parties on interest to intervene/ confidentiality
  - Order of the General Court accepting/ rejecting application
  - Statement in Intervention and attendance of oral hearing
  - Time-limits (written/ oral procedure)

- **Appeals**
  - Appeals against judgments of the Civil Service Tribunal (not any longer)
  - How to recognise? → Case T-123/17 **P**

- **Application on taxation of costs**
  - Disputes with regard to the costs
  - How to recognise? → Case 123/17 **DEP**

- Other available procedures (examples): requests for anonymity, request for rectification of judgment

Procedure before the General Court
Other procedures (II)

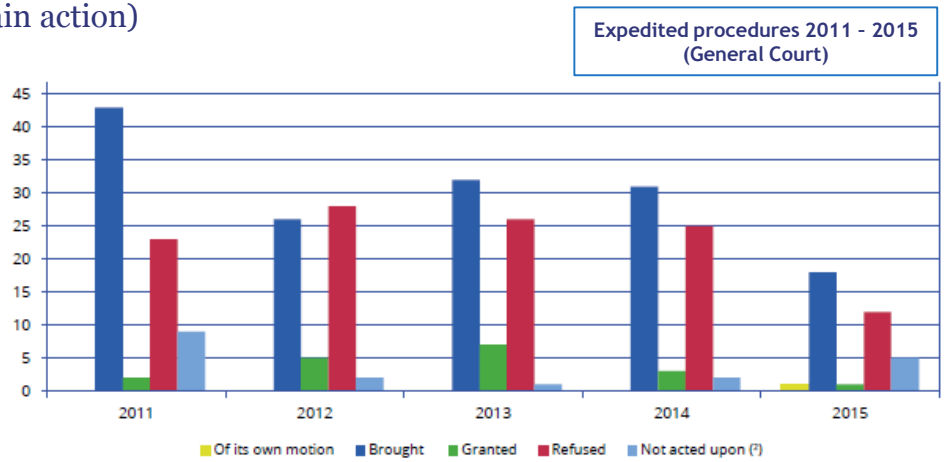
- **Urgent procedures:**

(i) Interim measures (Articles 278 & 279 TFEU and Articles 156 *et seq*. of Rules of Procedure)

- main action is prerequisite – but separate application (at the same time or shortly after main action)
- conditions to be fulfilled (urgency & "*fumus boni juris*")
- only granted to maintain the full efficacy of the judgment on substance
- very short deadlines (even *ex parte*, i.e. before having heard the opposite party!)
- reasoned Order of the President of the General Court served to the parties
- How to recognise? → Case T-123/17 **R**

(ii) Expedited procedure (Articles 151 *et seq*. of Rules of Procedure)

- separate application (at the same time with main action)
- condition to be fulfilled: urgency
- shorter deadlines
- General Court can also decide on its own motion



Source: CJEU Annual Report 2015: Judicial activity (General Court) p. 178

Bird & Bird

Effects of the judgment

Article 264 TFEU:

"If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive. "

- Judgment or Order of the General Court
  - Judgment is binding from the date of delivery
  - Order is binding from the date of its service
  - Notice including date and operative part of judgment/ order is published on the OJEU
- Judgment can only annul the contested act (*ex tunc* and *erga omnes* effect) – cannot make a declaration of law or issue orders, directions or injunctions to Union institutions
  - Exceptionally the General Court can limit the temporal effect of its judgment
- Possibility for partial annulment
- Obligation for the Institutions concerned to comply with judgment (Article 266 TFEU)
- Judgment/ Order of the General Court can be **appealed** before the Court of Justice within 2 months from notification (Article 56 of CJEU Statute)

Thank you

Marianna Rantou
Bird & Bird LLP, Brussels
Marianna.Rantou@twobirds.com

Case study on drafting an action

"Litigating European Union Law" Seminar

Academy of European Law, Trier

15 February 2017

Marianna Rantou

Bird & Bird LLP, Brussels

Introduction

1. Purpose of the exercise:

   - Identify whether or not the act can be contested before the General Court
   - Calculate time-limit
   - Establish whether the client has *locus standi*
   - Determine the scope of the action

2. Limitations:

   - Identifying legal issues – not drafting grounds for annulment

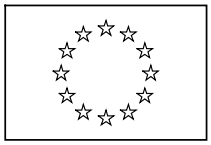
Case study - introduction

1. Reading background documents
2. Discussing/ identifying key facts
3. Break into two groups
4. Questions for discussion and issues to be addressed within each group
5. Each group to prepare a skeleton draft of an application for annulment
6. Common discussion about the results

Case study

Questions to consider

- Is this an act that can be challenged before the General Court?
- By whom? (identify all possible parties)
- Does your client have standing? (What will they need to focus on their admissibility section?)
- When is the deadline to bring an application for annulment? (What is the most prudent option to advise the client?)
- What grounds for annulment would you consider?
  - Breach of EU law? Which rule was breached?
  - Breach of a procedural requirement?
  - Other?
- What would you include in the form of order sought? (How would you phrase it?)



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10.10.2001
COM(2001) 574 final

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

The repercussions of the terrorist attacks in the United States on the air transport industry

COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT AND THE COUNCIL

The repercussions of the terrorist attacks in the United States on the air transport industry

1. INTRODUCTION

1. The European air transport industry has been hard hit by the terrorist attacks of 11 September in New York and Washington. The European Union immediately mobilised to tackle the most pressing problems and also to adapt the rules in force as necessary to the new situation. Apart from the measures to improve air transport security that were discussed by the European Council of 21 September 2001 and by the Council of Transport Ministers on 14 September 2001, the question arises as to the impact the attacks will have on an air transport sector already in need of consolidation.

2. Mrs de Palacio met representatives of the Association of European Airlines (AEA) on 20 September. While accepting that airlines are currently facing an exceptional situation, she pointed out that the Commission could not accept measures that would create distortions between countries and between companies, nor could it allow the present situation to be used as a pretext for delaying essential restructuring. On the other hand, she confirmed that certain measures could be taken to deal with this special situation and also accepted the legitimacy of the reinforcement of certain security measures being borne by the public authorities.

3. In view of the substantial increase in insurance premiums to cover the risks of acts of terrorism and war, some Member States announced, from the end of the week of 17 September, their intention of granting aid to their national airlines. The Commission immediately referred the matter to the Ministers of Finance at their meeting of 22 September in order to have a coordinated response. The Ministers considered that Member States could exceptionally provide cover for these risks or assume the cost of the increase in premiums on condition that such aid was strictly regulated and duly notified to the Commission.

4. At the same time, the United States government adopted a package of measures to support its airlines. These measures must be examined to verify whether they could have an effect on markets where American and European airlines are in intense competition, i.e. primarily the transatlantic routes. This issue is difficult to assess for the time being.

5. In its analysis of support for the industry, the Community must ensure that any measures are avoided if they are liable to distort competition, or to hinder or put into question the essential moves towards consolidation and restructuring in the sector that were already in progress before the events of 11 September.

2. PRELIMINARY EVALUATION

6. The impact of the attacks was severely felt in the United States: the terrorists' targets were situated on American territory, the aircraft involved operated on US domestic routes, the

American authorities closed their airspace for several days and the American public immediately reacted by cancelling most of their travel plans. Even though the European industry was less directly affected, it was forced to cancel flights to the United States during this period and the psychological effect on the travelling public is also being felt in Europe.

2.1. The situation in Europe

7. The European air transport industry suffers from chronic under-capitalisation and excessive fragmentation, it is heavily in debt and has permanent cash-flow problems. The slowdown in economic growth that was already apparent was already posing severe problems. The crisis is hurting European airlines at a time when they were already feeling the effects of last year's increase in the price of aviation fuel. Some had embarked on restructuring plans, but there is still a long way to go in this area. The current crisis is compounding problems that existed before the attacks, in an industry which had already begun to restructure.

8. In the days immediately following the events of 11 September, demand plummeted. This phenomenon was particularly marked in the United States, where demand fell by around 75%, including on the transatlantic routes served by European airlines. In Europe, the fall in traffic has been much less severe so far, but nevertheless demand is down by 15-30%; the passenger load factor has declined particularly sharply on secondary routes (by about 20-30%), with consequences for regional airlines in particular.

9. Forecasts by the AEA based on a sample of 13 airlines indicate that, by the end of the year, revenue losses will amount to €3.6 billion as a result of an estimated reduction in traffic of 7.7% and a 4.7% reduction in capacity.

10. According to the AEA, the airlines have grounded 108 aircraft or the equivalent of 5.6% of the fleet, and the jobs of 17 000 employees (5%) in the airlines themselves are under threat. British Airways, for example, has announced it is cutting 5 200 jobs, in addition to the 1 800 redundancies already scheduled until March 2002. Further job cuts are expected which could affect a total of 30-40 000 employees.

11. Some, in particular American, airlines are taking this opportunity to dispose of their oldest aircraft. Many airlines have announced they are suspending all recruitment of staff; some have already gone ahead with major redundancies. The industry expects further layoffs, which will doubtless be more extensive than those envisaged in the event of a cyclical downturn.

12. There have also been changes to the networks, not only on routes to the United States but also the Middle East and even in Europe; some destinations, particularly on "thin" routes, are no longer served. To take the example of one airline, Lufthansa has not only had to cancel some long-haul services from Frankfurt to Rio de Janeiro and Bogota and on the Berlin-Washington route, but also to reduce the number of services from Frankfurt to Washington and New York. Lufthansa has also announced the cancellation of services from Frankfurt to Paris Orly and Valencia as well as the Hamburg-London, Dusseldorf-Moscow and Dortmund-Copenhagen services.

13. Despite these measures, some costs are showing a sharp increase, making the crisis even more difficult to manage. The AEA estimates that the additional security measures could

cost as much as €145 million. The same applies to insurance premiums: all insurance costs have practically doubled, resulting in additional costs to the European industry.

14. Finally, the current uncertainty is placing a heavy burden on the industry. In view of the risk of future attacks, insurers initially announced that they were limiting policy cover to a level far below the current practice. The value of airline shares on the stock exchange was halved in two weeks, reflecting investors' lack of confidence and making it more difficult to finance the airlines' operations. The Commission is unable at this stage to give a precise assessment of the magnitude of the crisis and its impact on the European industry. It will therefore continue to monitor developments in order to be able to react and to coordinate the reactions of Member States over and above the measures presented in this Communication.

2.2. The situation in the United States

15. In comparing the situation of the American and European airlines, it must be borne in mind that each of the three largest American airlines, as pointed out in the White Paper on the common transport policy, carries an average of 90 million passengers every year compared with between 30 and 40 million for each of the largest European carriers (i.e. a ratio of 1 to 3).

16. As a result of the terrorist attacks, the American airlines have announced losses of about $10 billion for 2001. ATA, the American Air Transport Association, has announced job cuts of the order of 100 000 in the US air transport industry, while the airlines expect losses of $18-33 billion for 2002 linked to the attacks.

17. Congress adopted an emergency package of measures on 21 September as part of an overall programme that may amount to $18 billion, consisting primarily of:

- **direct and immediate aid of $5 billion** to compensate the American airlines for direct losses resulting from the closure of airspace, and the consequences of the attacks on air traffic for the period 11 September to 31 December 2001. This aid is likely to be distributed in proportion to the capacity of each airline prior to 11 September (available seats-miles);

- **the allocation, according to criteria fixed by the President, of "federal credit instruments"** in the form of subsidised Treasury loans or loan guarantees, worth a potential **$**10 billion;

- **the creation of an Air Transportation Stabilisation Board to monitor allocation of the above financial instruments.** It is composed of: the Secretary of Transportation or his Deputy, the Chairman of the Board of Governors of the Federal Reserve, who chairs the board, the Secretary of the Treasury and the Comptroller General;

- **definition of the compensation principles:** each airline must produce proof of the losses suffered as a result of the terrorist attacks, and in particular provide all the economic and financial justification, under the supervision of the Secretary of Transportation and the Comptroller General, who may order financial and accounting audits of the applicants;

- **$3 billion will be allocated to the safety and security** of air transport from the victims compensation fund totalling 40 billion.

18. The aid is subject to certain conditions; a freeze on salaries above a certain level until 11 September 2003 and an obligation on the carriers to maintain essential air services. The Commission will verify whether the package of measures for American airlines can have an impact on the markets where these companies are in fierce competition with European ones, that is, mainly on trans-atlantic routes.

3. THE SPECIFIC PROBLEM OF INSURANCE

19. Air carriers have traditionally been well covered against the loss of their aircraft and liability *vis-à-vis* passengers and third parties. The terrorist attacks have exposed the vulnerability of the air transport sector, with damage exceeding all rational estimates. A few days after the events, insurers announced the withdrawal or drastic reduction in "liability" cover for war and terrorism risks. This led many Member States to question the traffic rights of companies unable to show they had adequate cover. Insurers also announced huge increases in premiums for the cover they continued to provide. They then proceeded to notify other undertakings in the sector that they were withdrawing or reducing cover: airports, groundhandling providers, air navigation services, etc.

20. All Member States[1] introduced temporary mechanisms providing liability insurance for airlines for a period of 30 days pending the restoration of an acceptable level of cover by commercial insurers (see in particular point 5.2 below). These measures must of course be notified to the Commission for examination of their compatibility with the Treaty. Member States are currently notifying their measures, which the Commission will examine on the basis of the rules on State aid.

21. The Commission, while recognising the considerable financial burden on insurers, must nevertheless examine whether their behaviour is compatible with the competition rules of the Treaty. To this end, it has launched own-initiative proceedings to verify the compatibility with the competition rules of the conditions under which the increases in premiums were decided.

22. The airlines' cover is being restored, although the financial conditions are extremely onerous. In practice, airlines would have to pay surcharges on their existing insurance premiums corresponding to about $3.10 per passenger without profit. However, the other operators are still without cover: airports, suppliers of groundhandling services and providers of air navigation services. This is highly prejudicial to the functioning of air transport and is liable to cause serious economic and social disruption. According to the information received from insurers and national authorities, cover for other operators will be introduced in the very near future, enabling them to respond better to the current situation.

23. In view of the uncertainty surrounding the return to the market at the end of the 30-day period, and in order to take account of the measures taken in the United States which are providing cover for 180 days, it is hard to envisage the removal of the cover guarantees given by Governments after the initial 30-day period. This crisis has shown that similar events in future could lead to renewed withdrawal of cover from aviation industry operators. The Member States have asked the Commission to draw up guidelines to ensure an efficient and coherent response in such cases. In addition, in order to maintain equal

[1] See Annex (1).

conditions of competition with third country airlines and to avoid diverging responses by Member States, the Commission considers that all Member States must verify whether third country airlines produce proof of minimum risk cover on the basis of the European Civil Aviation Conference (ECAC) recommendations. In the absence of such cover, Member States would be obliged to take appropriate, coordinated action, i.e. to withdraw traffic rights and prohibit overflight in accordance with the Community's international obligations.

4. SECURITY MEASURES

24. The Extraordinary European Council of 21 September called on the Transport Council to take measures concerning the classification of weapons, technical training for crew, checking and monitoring of hold baggage, protection of cockpit access and quality control of security measures applied by Member States.

25. The Commission has already sent several proposals to the Council enabling it to introduce some of these measures:

- the amendment of the Regulation on the harmonisation of technical requirements (JAR-OPS) and administrative procedures in the field of civil aviation[2], which will enable the necessary measures to be taken to strengthen cockpit doors;

- the proposal for a directive on occurrence reporting in civil aviation[3] provides for monitoring compliance with security measures;

- the Commission proposal on safety requirements and attestation of professional competence for cabin crews in civil aviation[4] will harmonise training for this category of personnel. The Council should be able to adopt a common position on this proposal on 15 October.

26. The Commission is also proposing a Regulation establishing common rules for the security of civil aviation. Adoption of this proposal will enable common rules to be established on baggage inspection and passenger checks and to organise monitoring of compliance with the common rules. In the interim, the Commission has proposed to Member States that inspections should be organised at airports, reinforcing the measures initiated by the European Civil Aviation Conference (ECAC) some months ago. The *ad hoc* working group set up by the Council will present a preliminary report to the Transport Council on 15-16 October, which can serve as a basis for strengthening the ECAC recommendations. There will be parallel consultation of the relevant professional organisations and by the sectoral dialogue committee in civil aviation.

27. The air transport industry has itself traditionally borne the bulk of security costs. The reinforcement of certain security measures by the public authorities in the wake of attacks directed against society as a whole and not at the industry players must, in the Commission's opinion, be borne by the State. It goes without saying that, if certain measures are imposed directly on airlines and other operators in the sector such as airports, suppliers of groundhandling services and providers of air navigation services, the

[2] COM(00) 121 final, 24.03.2000 COD (2000/0069)
[3] COM(00) 847 final, 19.12.2000 COD (2000/0343) and amended proposal of 25.09.2001: COM(01) 532
[4] COM(97) 382 final, 22.07.1997 and amended proposal of 05.03.1999: COM(99) 68 final.

financing of such measures by the public authorities must not give rise to operating aid incompatible with the Treaty.

5. APPLICATION OF THE RULES ON STATE AID

28. In examining State aid measures compatible with the Treaty, the Commission gives priority to those least likely to distort competition between Community airlines, i.e. measures applicable to all Community undertakings on a uniform basis. The airlines have themselves requested that the support measures they are seeking should not lead to unequal conditions of competition and for that reason they favour measures at Community level.

29. In this regard, the Commission stresses that the events of 11 September 2001 must not undermine the Commission's policy on State aid to restructuring based in particular on the "one-time, last-time" principle. They must not be used as a pretext for bypassing the existing framework for aid to restructuring in order to remedy the serious problems which for months and sometimes years have dogged certain Community airlines attempting to restructure.

30. The Commission would also point out that any State aid measure adopted by Member States must be notified to allow the Commission to examine its impact quickly and ascertain its compatibility with the Treaty. The informal Ecofin Council which met in Liege on 22 September also stressed this obligation.

31. During the Gulf crisis, the Commission took a number of measures for a limited period of three months to help airlines cope with the short-term problems. In particular, it declared its intention of examining favourably certain types of State aid intended to offset the additional costs of security and insurance and to postpone collection of some of the fees for air traffic control, as well as to authorise under the competition rules applicable to air transport certain agreements between airlines on capacity reduction, joint operations and slot allocation at airports. The industry reacted well to the situation and traffic resumed shortly afterwards. Since then, the regulatory framework in the sector has changed: the air transport market is now organised according to the principle of free access, enabling carriers to develop their activities in a competitive environment, to adapt their operations, capacity and schedules more flexibly to demand and to weather crisis situations better.

32. The *ad hoc* working group appointed by the Extraordinary Transport Council of 14 September, which met three times on 25 September, 2 and 5 October respectively, has gathered information on the main support measures designed to offset the increase in insurance costs and the additional costs of tighter security requirements. This also showed that there is a risk of competition being distorted as a result of the aid granted to American airlines to compensate for their loss of revenue in the days when all air traffic in the United States was grounded.

33. As operating aid is in principle prohibited, the Commission considers that the provisions of Article 87(2)(b) of the Treaty fit the problems currently facing the airlines. It is of the opinion that, given their unforeseeable nature, the number of victims and the impact on the world economy, the events of 11 September 2001 were exceptional occurrences within the meaning of Article 87(2)(b). However, the temporary measures to support airlines taken by Member States should not result in over-compensation for the damage suffered.

34. At this juncture, the Commission considers that the provisions of Article 87(2)(b) of the Treaty may apply to two types of damage resulting from the events of 11 September 2001.

5.1. Measures to compensate for the costs to airlines of American airspace being closed for four days

35. The Commission considers that the costs arising directly from the closure of American airspace between 11 and 14 September 2001 are a direct consequence of the events of 11 September. They may therefore give rise to compensation by Member States in accordance with Article 87(2)(b) of the Treaty on the following conditions:

    - compensation is paid in a non-discriminatory manner to all airlines in a given Member State;

    - it concerns only the costs incurred during the days 11 to 14 September 2001 following the grounding of air traffic decided by the American authorities;

    - the amount of compensation is calculated accurately and objectively by comparing the traffic recorded by each airline during the four days in question with that recorded by the same airline in the preceding week, adjusted to take account of the development in the corresponding period of 2000. The maximum amount of compensation, which must take account in particular both of the actual costs incurred and those avoided, is equal to the loss of revenue duly recorded during these four days. It must of course be less than four 365th of the airline's turnover.

36. The possible distortions of competition caused by direct aid to the American airlines cannot be addressed in the absence of a contractual framework for relations between the Community and the United States. Member States have opted for a framework of bilateral agreements which deprives them of any capacity to react. In keeping with the 1994 guidelines on State aid to the aviation sector, the Commission considers that, if State aid provided by third countries leads to very low fares, such practices must be examined in the context of the Community's external policy. Should the policy be found to be predatory, the Commission reserves the right to make proposals to offset the loss the Community airlines might suffer as a result. In addition, the Commission will propose a Code of Conduct in this area to the United States.

5.2. Assumption of the extra cost of insurance

37. On 22 September the Ecofin Council discussed emergency measures Member States could take to help airlines meet the extra costs of insurance in the next few months under certain conditions. It concluded in particular that:

    – support must be limited to addressing a failure in the commercial insurance market in order to ensure that third party cover for war and terrorism risks remains available;

    – governments must charge a reasonable premium which as far as possible reflects the risks covered by the schemes introduced, although this condition may be waived in the sort term;

    – the schemes will be introduced for one month while work will continue on finding a lasting solution and to encourage the industry to return to the market as soon as possible.

The Council also drew attention to the obligation to notify these measures to the Commission for the purposes of verifying their compatibility with the State aid rules.

38. In taking the necessary decisions on the measures notified to it in the framework of the State aid rules, the Commission will take account of all pertinent circumstances and in particular whether the public intervention concerned:

    - applies uniformly without restriction to all companies in a given Member State;

    - is limited to a period of one month;

    - is exclusively intended to compensate for the extra cost of insurance resulting from the events of 11 September 2001 and in no way places the airlines in a more favourable situation than that prior to 11 September 2001.

39. Developments in the insurance market suggest it is unlikely that the measures can be terminated after one month. However, the Commission considers that there are no grounds for insurance companies withdrawing cover from other operators in the air transport industry, such as airports, groundhandling providers and air navigation services; the risks associated with these activities are not of the same nature as those resulting from the suicide attacks of 11 September.

40. If the situation should continue beyond the initial 30-day period, the Member State concerned may decide either to continue providing a supplementary guarantee to the insurance companies, or to underwrite the risk directly itself. At any event, Member States must follow common guidelines with regard to the following:

    - duration;

    - level of cover;

    - methods of setting premiums;

    - players covered ;

    - treatment of third countries.

    The Commission will examine any government aid notified to it by virtue of Article 87(2)(b) in line with the above principles. Moreover, the cost of this supplementary cover must be terminated by 31 December 2001 at the latest and passed on to the airlines in order to restore equal conditions of competition between Community carriers.

41. This crisis has nevertheless shown that similar events in future could lead to a renewed loss of cover for air transport operators. The Member States have asked the Commission to draw up guidelines to guarantee an effective and coherent response in such cases. Such possible responses could include the establishment of a "mutual fund" for risks in order to avoid the cost of national measures in the case of a common challenge. The alternative possibility of the airlines themselves establishing insurance pools specialised in the cover of risks relating to air transport also merits consideration. A compensation fund might be another possible option. In addition, the Commission proposes harmonising the amounts and conditions of insurance required for the issue of operating licences (Council Regulation 2407/92) and will present proposals to this effect.

6. OTHER COMMUNITY MEASURES

42. The Commission has to monitor application of the competition rules and of the rules on slot allocation at Community airports. The impact of the drop in demand must be assessed in the light of the application of these rules.

6.1. Slots

43. The reference point of the Regulation on slot allocation (Council Regulation 95/93) is the situation during a coordination season. Article 10(3) of the Regulation provides that carriers are not entitled to the same series of slots for the next equivalent period unless they can demonstrate to the satisfaction of the coordinator that they have used these slots, as cleared by the coordinator, for at least 80% of the period for which they were attributed.

44. However, the Regulation also accepts that exceptional circumstances, namely unforeseeable and irresistible cases outside the air carrier's control, may affect the use of slots. Article 10(5)(a) and (e) allows carriers to cite circumstances such as the grounding of aircraft or the closure of an airport or airspace, or the interruption of a series of services due to action intended to affect these services making it practically or technically impossible to carry them out, in order to avoid losing their slots with established historical precedence (grandfather rights) during the season and the next equivalent season.

45. The Commission considers that the closure of American airspace between 11 and 14 September and the subsequent changes to services (suspension, reduced frequencies) constitute exceptional circumstances that impact negatively both on the transatlantic network of the airlines and on the intra-Community feeder routes. It considers that coordinators should interpret the provisions of the above Regulation in such a way that airlines do not risk losing their unused slots as a consequence of the terrorist attacks.

    Carriers should therefore be able to keep their slots with grandfather status during the next coordination season in summer 2002. In this way the slots unused during the current season can be reallocated as "*ad hoc*" slots by the coordinators for the remainder of the season and used by other air carriers without conferring grandfather rights.

46. If the current situation continues and impacts significantly on the 2001/2002 winter season which commences on 26 October, the Commission will examine whether it should continue these arrangements in the light of the justification provided by the airlines at that time.

6.2. Coordination of schedules and capacities

47. The sharp fall in demand and the increase in costs resulting from the current crisis might lead airlines to cut back significantly on capacity, the number of links and frequencies of certain services. It must therefore be examined whether the current situation could affect the application of the competition rules to airlines.

48. The Commission stresses that the application of the competition rules enables account to be taken of changes in the economic situation of the market due to unforeseen events or the normal business cycle. Furthermore, airlines are at all times free to reduce their capacities, adjust their schedules or decide to discontinue certain services. Under certain conditions they may also decide to act in concert.

49. At the moment, however, it does not appear essential to adopt *ad hoc* legislative measures such as a block exemption. The applicable rules currently[5] permit certain types of coordination, such as consultations on slots and on passenger tariffs in order to facilitate "interline" connections. Schedule and capacity coordination already takes place in the framework of alliances. In any event, other more specific forms of cooperation may benefit from an individual exemption under Article 81(3) of the Treaty if their advantages outweigh any restrictive effects on competition. The Commission will therefore give favourable consideration, for example, to capacity coordination agreements intended exclusively to maintain a regular service on "thinner" routes or at off-peak times.

7. STRENGTHENING THE CAPACITY OF THE INDUSTRY AND OF THE COMMUNITY TO REACT

7.1. Consolidation of the air transport industry

50. The European aviation market remains fragmented despite the consolidation efforts in progress. The results of this fragmentation of industry and market are plain to see: the European airlines and their customers do not benefit from the full potential of the internal market. Many European carriers are small compared to their international competitors. Some are facing serious financial problems and can continue operations only with partners. The Community has little influence in the absence of a common approach by the commercial partners and in international negotiations. The moves to restructure and consolidate Community airlines must therefore be continued and even speeded up in some cases. This will require social dialogue to be stepped up.

7.2. A coherent policy *vis-à-vis* third countries

51. The question of ownership and control must also be urgently addressed: the restrictions imposed on airlines by the traditional ownership and control rules in the bilateral agreements make mergers and takeovers difficult. In this context, the Commission would emphasise the need to establish a dynamic, coherent policy in the field of external relations as quickly as possible.

52. The current crisis demonstrates the urgent need to take account of developments in North America, to coordinate actions with the American authorities and to ensure equal conditions of competition on the Atlantic routes. An agreement of this nature would also have to make provision for crisis mechanisms and preclude unilateral measures which could unduly prejudice the interests of the other party. Subject to the adoption by the Council of negotiating directives, a full EC-USA agreement could be negotiated at short notice to provide the framework and the necessary structures ensuring safe, reliable operating conditions in a competitive environment for airlines on both sides.

53. More generally, the role of ICAO must be reinforced in the area of security, as has already been done on safety, to ensure that aircraft flying into European airports or transiting Community airspace comply with certain minimum rules. In order to ward off this new type of attack, compliance with these rules must be ensured on domestic as well as on international flights.

---

[5] Commission Regulation (EEC) No 1617/93 of 25 June 1993 on the application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices concerning joint planning and coordination of schedules, joint operations, consultations on passenger and cargo tariffs on scheduled air services and slot allocation at airports, as amended by Commission Regulation 1324/2001 of 29 June 2001.

This need for international cooperation also applies to insurance: in the absence of cover for terrorist risks or war, the Community must act to prohibit access to its airports and its airspace. As this could have considerable implications above all for developing countries, the Commission will mobilise the resources allowed under the agreements concluded by the Community in order to provide the necessary assistance.

The Commission is particularly favourable towards a better coverage of the air transport sector by the WTO.

7.3. The Single Sky

54. The airlines have emphasised the importance of speedily creating the Single European Sky in order to improve the safety of air transport. The Commission shares this concern, as it is crucial to the safety and competitiveness of the industry. The proposals are ready. The Commission has called on the Member States to move this dossier forward and takes note of the agreement reached on the application of the legislation to Gibraltar airport. In order to get this vital project off the ground as of 2004, the Commission will present a major package of legislative proposals which will help reduce the costs relating to the organisation of airspace and enhance the efficiency of cooperation to make this space safe.

8. CONCLUSIONS

55. The Commission therefore considers that the situation created by the terrorist attacks of 11 September justifies the adoption of emergency measures in the framework of the current rules and policies:

- The Commission will examine favourably in the framework of State aid and in the light of the criteria described, measures to compensate airlines for losses resulting directly from the four-day closure of American airspace:

- It will examine in the framework of State aid and in the light of the criteria described:

  a) the assumption of the additional costs of insurance for a maximum period of one month;

  b) the temporary continuation of intervention by Member States until the end of the year should the need for cover persist, on condition that it does not place the airlines in a more favourable position than that prior to the withdrawal of their insurance cover.

- With regard to security,

  The Commission considers that the reinforcement of certain security measures must be borne by the public authorities.

- With regard to the competition rules applicable to air transport:

The Commission will examine on a case-by-case basis whether the conditions for an exemption under Article 81(3) of the Treaty are met. It will give favourable consideration to the capacity coordination agreements designed to maintain a regular service on less frequented routes or to coordinate schedules during off-peak periods of the day.

– With regard to slots:

The Commission considers that the airlines may retain their slots with grandfather status in Community airports during the summer 2002 season. If the current situation continues into the winter 2001 season, which begins on 26 October, the Commission will examine whether measures should be introduced for the corresponding 2002/03 season.

– With regard to relations with third countries:

Should there appear to be predatory pricing, the Commission reserves the right to make proposals to offset the loss Community airlines might suffer as a result. The Commission will propose a code of good conduct to the United States authorities in order to avoid distortions of competition resulting from the aid received by American airlines.

The Commission notes that it has always defended Community competence in the framework of international negotiations on air transport. As regards transatlantic relations in particular, the Commission considers that the Council should as soon as possible agree the draft negotiating mandate as a basis for negotiating an agreement with the United States in order to create the necessary framework and structures to ensure safe and reliable operating conditions in a competitive environment for airlines on both sides. This would make it possible to adapt the regulatory framework of the undertakings and in particular the ownership rules.

In the absence of such an agreement and pending the negotiating mandate, it is up to the Member States to proceed with a minimum of Community coordination in the framework of the bilateral agreements.

56. The Commission will also examine:

a) the possibility of "mutualisation" of insurance risks at European level;

b) the revision of the amounts and conditions of insurance required for the issue of operating licences (Council Regulation 2407/92) in order to ensure a harmonised approach.

57. The Commission will continue to monitor closely developments in the air transport sector and to act quickly should the situation deteriorate.

Depending on how the current situation evolves, the Commission reserves the right to review the measures taken or announced in this Communication.

In addition, the Commission will examine the implications with all the industrial players and social partners.

58. It is up to the Council and the European Parliament to adopt the security measures required by the present situation when they consider the proposals pending. The Commission proposes common rules on aviation security which it asks the two institutions to examine as a priority.

ANNEX

Measures planned or taken by Member States to cover the additional costs of insurance

Member State	Insurance - own Airlines	Requirement - foreign airlines	Insurance - service providers	Duration	Premium
Belgium	Up to former level	ECAC	Up to former level	30 days	Former level plus surcharge
Denmark	Up to former level	Set out in air navigation act	Up to former level	1 month	$0.25 for $50-750 m $0.50 for $750m - $1bn
Germany	Up to former level	Former level	Up to former level	1 month	Not yet decided
Greece	Up to former level	-	Not yet decided	30 days	Not yet decided
Spain	Up to former level	Rome Treaty Air navigation act-royal decree no. 37/2001	AENA included and other services providers not yet decided	30 days	$0.25 up to $750 m $0.50 up to $2 bn
France	Up to former level	No change	Up to former level	30 days	Not yet decided
Ireland	Up to former level	Not covered by Ireland	Up to former level	30 days	Not yet decided
Italy	Up to a maximum of €2.2 bn for each aircraft	Not covered	Not covered for the moment	30 days	Free (no premiums required)
Luxembourg	Former level - up to $2 bn		No notification of cancellation received	1 month	Waived
Netherlands	Up to former level	ECAC	Up to former level	30 days	Premium waived for first 30 days
Austria	Up to $700m	-	-	30 days	Market conditions - premiums not yet decided
Portugal	Up to former level	Former level	Up to former level	1 month	Not yet decided
Finland	Up to $1bn	-	-	Max 30 days, subject to cancellation at any time	Theoretically same as previous premium - waived initially for legal reasons
Sweden	Up to former level	-	-	30 days	"Premium reflects as far as possible the risks associated with the guarantee"
United Kingdom	Up to former level	Not covered	Up to former level for providers	30 days (7 days notice of	$0.25 per passenger flight up to $750m.

			whose cover withdrawn	cancellation)	$0.50 per passenger flight above $750m (waived for first 30 days) 25% of former premium for service providers.

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 26 April 2006

on state aid C 39/03 (ex NN 119/02) implemented by Greece for air carriers in respect of losses sustained from 11 to 14 September 2001

(notified under document C(2006) 1580)

(Only the Greek text is authentic)

(Text with EEA relevance)

(2010/768/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above [1],

Whereas:

1. PROCEDURE

(1) In accordance with Article 88(3) of the EC Treaty, in a letter to the European Commission dated 24 September 2002, registered as received on 26 September 2002 under No TREN(2002) A/66844, the Greek Ministry of Transport set out the details of a scheme to compensate for losses in the airline industry following the attacks of 11 September 2001.

(2) Having been implemented before its formal approval by the Commission, this measure was registered as non-notified aid under No NN 119/2002. This was communicated by letter with acknowledgment of receipt sent by the Commission on 28 October 2002 (TREN(2002) D/17401).

(3) By letter of 27 May 2003, the Commission notified Greece of its decision to initiate the procedure laid down in Article 88(2) of the Treaty in respect of this aid.

(4) The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* [2]. The Commission called on interested parties to submit their comments concerning the aid in question.

(5) The Commission received no comments from interested parties.

(6) The Commission received the initial comments from Greece regarding the initiation of the procedure by letter of 3 December 2003, registered as received on 10 December 2003 under No SG(2003) A/12211.

(7) Greece stated that it would be sending further information. As this failed to materialise, by letter TREN(2004) D/4128 of 15 March 2004 the Commission offered the Greek authorities one last opportunity to provide the additional information within 15 days and notified them that, if they failed to so, the Commission would take its decision on the basis of the information it already had. The Greek authorities did not reply to that letter.

2. DESCRIPTION OF THE NOTIFIED AID

Background

(8) As a result of the terrorist attacks in the United States on 11 September 2001, some areas of airspace were closed for several days. This was notably the case with the airspace of the United States, which was completely closed from 11 to 14 September 2001 and was reopened only gradually starting on 15 September 2001. Other countries had to take similar measures for all or part of their territory.

(9) For this reason, during that initial period airlines had to cancel flights using the airspace concerned. They also suffered losses owing to the disruption of other traffic and the fact that some passengers were unable to complete their journeys.

[1] OJ C 199, 23.8.2003, p. 3.

[2] See footnote 1.

(10) Given the magnitude and suddenness of the events and the costs they caused for airlines, the Member States had to consider exceptional compensation measures.

The scheme implemented by Greece

(11) The scheme that is the subject of this Decision provided for the payment of compensation for losses sustained by airlines from 11 to 15 September 2001; in fact, the notified scheme also provided for the payment of compensation for costs incurred after that period.

(12) In support of their scheme, the Greek authorities argued that the closure of airspace in the United States had direct consequences for the airlines even after 14 September 2001, since on 16 September 2001 an Olympic Airways flight to New York was cancelled preventively due to a lack of information regarding the possibility to land there. There was also compensation for costs incurred on 15 September 2001.

(13) The eligible air carriers were the air carriers holding operating licences issued by the Greek authorities pursuant to Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers ([3]).

(14) The Greek authorities indicated that they consulted all eligible air carriers; only three companies submitted compensation claims after all Greek air carriers were invited to do so by letters of 24 October and 5 December 2001 sent out by the local authorities. One of them, Axon Airlines, ceased operating on 3 December 2001, before the compensation was paid out in July 2002; Greece decided not to pay compensation to this air carrier because the objective was to enable air carriers to continue their activities and prevent the costs suffered following the attacks from affecting them excessively. The other air carriers that actually received payments were Olympic Airways, hereinafter referred to as 'OA', and Aegean Cronus, hereinafter referred to as 'AC'.

(15) In their notification, the Greek authorities indicated that payments to these companies amounted to EUR 4 827 586 for OA and EUR 140 572 for AC, making up the total of EUR 4 968 158 notified on 24 September 2002. These amounts were financed, in accordance with the applicable Greek legislation, from the TASS and TAEA funds for airport development and modernisation.

(16) The Greek authorities indicated that the companies received copies of the Commission's letter of 14 November 2001, which constituted the basis for compensation claims.

(17) Greece defined the losses eligible for compensation as losses sustained by air carriers and directly related to the events; they included losses of passenger revenue, losses of revenue from carriage of freight, losses due to the destruction of consignments of products which did not reach their destinations, costs occasioned by route diversion and time spent by aircraft at other airports owing to the closure of airspace, and costs of accommodation for passengers or crews.

(18) In the notification, the losses eligible for compensation were not limited to routes directly affected by the decision taken by some countries following the events to partially close the airspace; they in fact related to the entire networks of the air carriers and the compensation was payable for the total losses incurred across the entire network.

(19) Greece provided the Commission with information of varying degrees of detail concerning each beneficiary.

Olympic Airways

(20) In the notification, Greece informed the Commission that the total compensation was less than 4/365 of the undertaking's annual turnover. The compensation related not only to flights to the United States, Canada and Israel, but to the company's entire network.

(21) The compensated costs of GRD 1 645 000 000 (EUR 4 827 586) were broken down as follows:

1. *Revenue related to loss of passengers*

These made up the rounded amount of GRD 1 390 000 000 (EUR 4 079 237), of which approximately GRD 1 234 500 000 (EUR 3 622 894) related to the period from 11 to 15 September 2001; approximately GRD 821 000 000 (EUR 2 409 393) was for losses sustained in the North Atlantic airspace; the balance of approximately GRD 413 000 000 (EUR 1 212 203) was for the rest of the company's network, mainly the domestic and European networks, but also the Middle East, Africa, Australia and Asia.

Moreover, about GRD 150 000 000 (EUR 440 206) was for losses sustained on 16 September 2001 across the North Atlantic network.

([3]) OJ L 240, 24.8.1992, p. 1.

It was indicated that the amount of the compensation was calculated by comparing traffic recorded during the specified period with that recorded by the company on the corresponding days in the previous week, with a correction for the variation noted during the corresponding period in 2000. The loss was calculated on the basis of the average fare for that period for each category of destination.

2. *Other revenue lost and costs incurred*

The main items were:

(a) losses of revenue from carriage of freight: GRD 95 000 000 (EUR 278 797);

(b) costs related to the destruction of products: GRD 6 000 000 (EUR 17 608);

(c) various costs related to additional safety checks: GRD 19 000 000 (EUR 55 759);

(d) costs related to the cancellation of flights while in flight, flight diversion and grounding of aircraft in foreign countries: GRD 17 384 737 (EUR 51 019);

(e) extraordinary costs arising from 'ferry flights' ([4]): GRD 163 000 000 (EUR 478 357);

(f) costs of accommodation or overtime: GRD 50 000 000 (EUR 146 735).

3. *Deductions*

The deductions referred to fuel savings and amounted to GRD 95 000 000 (EUR 278 797).

Aegean Cronus

(22) Greece indicated to the Commission that the total compensation was calculated on the basis of similar but, of course, much smaller losses, since this company did not operate transatlantic flights. The compensation amounted to GRD 47 900 000 (EUR 140 572).

(23) The Commission decided to open the formal assessment procedure due to its doubts concerning the conformity of such an aid scheme with the Treaty, not only because the scheme exceeded the period specified in paragraph (35) of the Communication from the Commission to the European Parliament and the Council of 10 October 2001 entitled 'Repercussions of the terrorist attacks in the United States on the air transport industry' ([5]) (hereinafter referred to as 'the Communication of 10 October 2001'), but also and especially because of the absence of an exceptional occurrence and because of the change in the nature of losses eligible for compensation caused by extending the period beyond 14 September 2001.

3. **OBSERVATIONS SUBMITTED BY INTERESTED PARTIES**

(24) No interested third party submitted comments within the deadline of 1 month.

4. **COMMENTS SUBMITTED BY GREECE**

(25) The Greek authorities did not submit any additional comments to the Commission within the deadline of 1 month specified in the letter concerning the initiation of the procedure. Their letter of 23 July 2003, registered by the Commission on 28 July under No TREN (2003) A/26329, mentioned a reply to the decision of 27 May 2003 but it referred only to the removal of confidential information which should not be published. Nevertheless, after the Commission completed the first draft of the decision, Greece finally submitted a comment on 3 December 2003. The letter stated that Greece would be submitting further information; however, although on 15 March 2004 the Commission sent Greece a new invitation to provide its additional comments, Greece has sent the additional information promised.

(26) In their letter of 3 December 2003, the Greek authorities detailed some of the amounts notified for OA, but in a different way than in the notification; for example, they specified which amounts referred to the period from 11 to 14 September 2001 inclusive and which amounts referred to the period after 14 September 2001. They did not mention anything relating to the amount notified for AC.

1. **Losses sustained by OA from 11 to 14 September 2001 inclusive**

(27) Greece reported that OA incurred losses from 11 to 14 September 2001 due to the closure of United States, Canadian and Israeli airspace. For this reason, six transatlantic flights and one flight to Israel, all round-trip flights, were cancelled; based on the list of confirmed passengers for these flights and the average revenue per passenger, Greece stated that OA suffered a loss of GRD 654 650 000 (about EUR 1 921 203), deemed to be eligible for compensation.

([4]) The English expression used in the notification.

([5]) COM(2001) 574.

(28) The Greek authorities also reported two other costs incurred by OA during this period. The first cost was related to the extended grounding of an aircraft in Canada for the entire period in question; the cost amounted to GRD 12 967 457 (about EUR 38 056). The second cost was related to the return of a flight that had left Athens for the United States on 11 September 2001, giving rise to an additional cost of GRD 1 165 600 (EUR 3 421).

(29) The total costs presented by Greece for OA and relating to the period from 11 to 14 September 2001 thus amounted to GRD 668 783 057 (about EUR 1 962 680).

2. **Losses sustained by OA after 14 September 2001**

(30) Greece reported costs incurred by OA after 14 September 2001 in connection with three round-trip transatlantic flights on 15 and 16 September 2001 (one to the United States and two to Canada). Based on the list of confirmed passengers for these flights and the average revenue per passenger, Greece stated that OA suffered a loss of GRD 333 000 000, deemed to be eligible for compensation. Greece declared that this amount was equivalent to EUR 1 270 726; this is obviously a calculation error because applying the euro area entry rate for the drachma (1 euro = 340,75 drachma) actually gives an amount of about EUR 977 257.

(31) The flight to New York of 15 September 2001 was said to have been cancelled due to the lack of a landing slot; even though JFK Airport in New York reopened on 14 September 2001 at 23:00, Athens time, the strong demand for landing slots prevented OA from obtaining one. The Greek authorities indicated that they asked OA to provide confirmation of this situation, which was to be forwarded to the Commission. However, this failed to materialise, as the Commission did not receive any further correspondence on the matter.

(32) The flights to Canada on 15 and 16 September 2001 were said to have been cancelled due to the late return of the aircraft blocked in that country. Greece stated that OA did not have any other long-haul aircraft available on 15 September 2001, due to its other scheduled flights. For the flight of 16 September 2001, the late return of the abovementioned aircraft did not allow enough time for carrying out the technical checks and acquiring the landing slots for the new flight to Canada, which led OA to cancel the flight.

(33) The second type of costs incurred by OA and claimed were costs relating to the ferry flights provided by OA; there were three flights (one to the United States on 18 September 2001 and two others to Canada on 20 and 26 September 2001) which were carried out, according to the Greek authorities, as a result of the pressure exerted by the United States and Canada on OA to repatriate passengers from Athens to North America. The passengers in question had paid the normal fare, but the aeroplanes returned empty to Athens. The cost of the return flights, calculated on the basis of 'block hours' (the aircraft's flying times), were said to be GRD 166 051 680 (about EUR 487 312).

(34) The total costs presented by Greece for OA and relating to the period after 14 September 2001 thus amounted to GRD 499 051 680 (around EUR 1 464 569). All the explanations provided by Greece in the letter of 3 December 2003 thus seek to justify a compensation, for all the periods in question, of GRD 1 167 834 737 (about EUR 3 427 249).

5. ASSESSMENT OF THE AID

Existence of aid

(35) Pursuant to Article 87(1) of the Treaty, except where derogations provide otherwise, any aid granted by a Member State or through state resources which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States, is incompatible with the common market.

(36) Grants for air carriers represent allocations of state resources in favour of those companies and therefore constitute a clear economic advantage for them.

(37) This measure for the air transport industry had a selective character. Moreover, the air carriers receiving aid under this scheme were explicitly identified.

(38) In the air services market, which has been liberalised since 1 January 1993 when Regulation (EEC) No 2407/92, Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes [6] and Council Regulation (EEC) No 2409/92 of 23 July 1992 on fares and rates for air services [7] entered into force, air carriers in one of the Member States are in competition with other relevant companies in other Member States. In this case, the air carriers eligible under the notification are actively operating in the Community market. The subsidies granted to them and the advantage they gained in this way affect trade between Member States and are likely to affect competition.

[6] OJ L 240, 24.8.1992, p. 8.
[7] OJ L 240, 24.8.1992, p. 15.

(39) The measures constitute state aid and are compatible with the Treaty only if they are covered by one of the applicable derogations.

Legal basis for the assessment of the aid

(40) The derogations provided for in Article 87(2)(a) and (c) do not apply because this case does not involve social aid for individual consumers or aid for certain regions of the Federal Republic of Germany.

(41) Since this case is neither aid facilitating the development of certain regions nor aid facilitating the economic development of regions where the standard of living is abnormally low or where there is serious underemployment, nor aid facilitating the development of certain economic activities or regions, the derogations provided for in subparagraphs (a) and (c) of Article 87(3) do not apply.

(42) Finally, the derogations provided for in Article 87(3)(b) and (d), which aim respectively to promote an important project of common European interest or allow the remedying of a serious disturbance in the economy of a Member States and to promote culture and cultural heritage values, are not relevant in this case.

(43) Pursuant to Article 87(2)(b) of the Treaty, aid compatible with the common market is: 'aid to make good the damage caused by natural disasters or exceptional occurrences'. In its Communication of 10 October 2001, the Commission considered that the events of 11 September 2001 could be regarded as exceptional occurrences within the meaning of Article 87(2)(b) of the Treaty.

(44) In paragraph (35) of its Communication of 10 October 2001, the Commission explained the conditions that it deemed to be necessary for compensation related to those events to comply with the conditions of Article 87(2)(b):

'The Commission considers that the costs arising directly from the closure of American airspace between 11 and 14 September 2001 are a direct consequence of the events of 11 September 2001. They may therefore give rise to compensation by Member States in accordance with Article 87(2)(b) of the Treaty on the following conditions:

— compensation is paid in a non-discriminatory manner to all airlines in a given Member State;

— it concerns only the costs incurred during the days 11 to 14 September 2001 following the grounding of air traffic decided by the American authorities;

— the amount of compensation is calculated accurately and objectively by comparing the traffic recorded by each airline during the 4 days in question with that recorded by the same airline in the preceding week, adjusted to take account of the development in the corresponding period of 2000. The maximum amount of compensation, which must take account in particular both of the actual costs incurred and those avoided, is equal to the loss of revenue duly recorded during these 4 days. It must of course be less than four 365ths of the airline's turnover.'

Compatibility under Article 87(2)(b) of the Treaty

(45) The Commission notes that, even though only three air carriers formally applied for compensation for the costs incurred, all air carriers holding a public transport licence issued by the Member State in question are eligible under this scheme. The exclusion of one of them, Axon Airlines, because it had ceased operating when the letters notifying this scheme were sent out to the air carriers and, *a fortiori*, when the aid was paid, does not make the scheme discriminatory. The measure is therefore clearly non-discriminatory. However, the Commission notes that in their reply the Greek authorities limited themselves to providing information on costs incurred and compensation received by OA, without offering any information on AC.

Olympic Airways

(46) The compensation described above relates mainly to the period from 11 to 14 September 2001, specified in the Commission's Communication of 10 October 2001 and taken into account in its previous decisions in this area ([8]); however, the compensation also refers to the day of 15 September 2001 and even beyond.

The period from 11 to 14 September 2001:

(47) In its Communication of 10 October 2001, the Commission approved the principle of compensation for direct repercussions of the closure of airspace decided by the American authorities. The practical details for applying the Commission's Communication were laid down in the Commission's letter to the Member States of 14 November 2001; the letter referred in particular to the direct relationship that has to be established between 'the grounding of all traffic on American territory and the disruptions caused in the

([8]) See footnotes 9 and 10.

European sky'; in this respect, the measure, as described by the Greek authorities in their response to the initiation of the procedure, provides for limited compensation for routes or networks affected by the closure of airspace such as the airspace of North America (United States and Canada) and that of Israel. This principle was applied in previous decisions ([9]) adopted by the Commission in this respect.

(48) Therefore, with regard to the period from 11 to 14 September 2001 and the losses sustained in that period, which were directly related to the closure of airspace, the measure complies with the limitations specified by the Commission and especially with the requirement that the cost eligible for compensation be directly related to the closure of airspace.

(49) The method of calculating the operating losses eligible for compensation is based on the method that was laid down in the Commission's Communication and whose technical calculation rules were specified in the Commission's letter to the Member States of 14 November 2001; the loss of revenue sustained during the 4 days taken into account was determined on the basis of the passenger bookings on the cancelled flights. As regards the unit value of the loss suffered per passenger, in their reply the Greek authorities indicated that it represented the effective loss sustained by OA, amounting to GRD 654 650 000 (about EUR 1 921 203).

The additional costs eligible for compensation and relating to the extended grounding of an aircraft in Canada during the period in question, amounting to GRD 12 967 457 (about EUR 38 056) and the cost of returning to Athens a flight initially bound for the United States (on 11 September 2001), generating an additional cost of GRD 1 165 600 (EUR 3 421), were calculated using the same approach.

The ceiling of 4/365 of turnover applied by the Member State is in line with that specified by the Commission.

The Commission considers therefore that this calculation is within the maximum limit equal to the net loss of revenues recorded during those 4 days, as specified in its Communication.

(50) Consequently, the Commission comes to the conclusion that the measures introduced by Greece in favour of OA due to the closure of airspace from 11 to 14 September 2001, amounting to GRD 668 783 057 (about EUR 1 962 680), comply with the rules laid down in its Communication of 10 October 2001; they are therefore assessed as compatible with the EC Treaty within the meaning of Article 87(2)(b).

The period after 14 September 2001:

(51) Although the Commission, in paragraph (35) of its Communication of 10 October 2001, acknowledged the closure of airspace in the United States as an 'exceptional occurrence' and compensation for losses arising from that closure as compatible, it did not agree to give similar consideration to other losses indirectly related to the closure. This is especially the case with losses sustained by air carriers after the reopening of airspace on 15 September 2001.

(52) The Commission explained in its Communication of 10 October 2001 that losses eligible for compensation must be 'incurred … following the grounding of air traffic decided …'.

(53) The Commission notes at the same time that after 14 September 2001 the situation was not one in which air traffic was grounded but one in which the air carriers concerned faced constraints in operating their air routes.

(54) This is the case with the measures introduced by Greece in favour of OA and concerning mainly three transatlantic round-trip flights (one to the United States and two to Canada) that did not take place on 15 and 16 September 2001, representing a loss to OA of GRD 333 000 000 (about EUR 977 257).

(55) As regards the lack of landing slots in New York, Greece confirmed that JFK Airport was completely reopened on 14 September 2001 at 23:00, Athens time, and that only the strong demand for landing slots prevented OA from obtaining one. The Commission has not received any other information concerning the reasons for failing to obtain a landing slot while other companies were able to do so. In any event, the general impossibility of flying to the United States did not apply any longer.

(56) At the same time, the cancellation of the flights to Canada on 15 and 16 September 2001 was the result of choices made by OA, either because the company did not have any other long-haul aircraft available and preferred to operate other scheduled flights or because OA could not complete the technical checks and the acquisition of landing slots in due time and therefore had to cancel the flights.

([9]) See the similar decisions concerning France (N 806/2001 of 30 January 2002), United Kingdom (N 854/2001 of 12 March 2002) and Germany (N 269/2002 of 2 July 2002), which can be consulted at: http://europa.eu.int/comm/secretariat_general/sgb/state_aids/transports.htm

(57) As regards the ferry flights carried out by OA to the United States on 18 September 2001 and to Canada on 20 and 26 September 2001, costing GRD 166 051 680 (about EUR 487 312), the Greek authorities themselves indicated that the flights were carried out due to the pressure exercised by the United States and Canada on OA to return passengers from Athens to North America. This was therefore OA's decision, relating to flights carried out much later than the airspace closure period. This action automatically excludes any financing from a Member State. If the flights were really commissioned by third countries, it is for OA to obtain a refund from them, if the company considers that it can achieve this.

(58) As it has consistently stated in other decisions ([10]), the Commission cannot regard the indirect repercussions of the attacks of 11 September 2001, such as the difficulties encountered in operating air routes from 15 September 2001 onwards, in the same way as the direct repercussions, namely the complete closure of certain areas of the airspace until 14 September 2001 and the impossibility of operating the air routes using those areas. The indirect consequences of the attacks have affected many sectors of the global economy for a long time, some for longer than others, but by comparison with other economic or political crises these difficulties, damaging as they are, do not constitute exceptional occurrences and therefore cannot allow the application of Article 87(2)(b) of the Treaty.

(59) The Commission therefore concludes that the scheme does not comply with the Treaty as regards the part relating to dates after 14 September 2001, especially the costs presented by Greece for OA for the period after 14 September 2001 and amounting to GRD 499 051 680 (about EUR 1 464 569), not only because the period specified in paragraph (35) of the Communication of 10 October 2001 was exceeded, but also and especially because of the absence of an exceptional occurrence and the change in the nature of the loss eligible for compensation caused by exceeding the period. This operating aid cannot be authorised under other Treaty provisions. The aid for the period after 14 September 2001 is therefore incompatible with the Treaty. The Commission notes in this respect that the total amount presented by the Greek authorities in their reply of 3 December 2003 is different from and less than that notified initially and probably paid. Therefore, any aid granted to OA in excess of the above-mentioned amount of GRD 668 783 057 (about EUR 1 962 680) is incompatible with the Treaty and must be recovered.

([10]) See the Commission's negative decision 2003/196/EC of 11 December 2002 on state aid C 42/02 (ex N 286/02) planned by France in favour of French air carriers and extending beyond 14 September 2001 the compensation initially approved by decision N 806/2001 (OJ L 77, 24.3.2003, p. 61).
See also the partially negative decision 2003/637/EC of 31 April 2003 on state aid C 65/02 (ex N 262/02) planned by Austria in favour of Austrian air carriers (OJ L 222, 5.9.2003, p. 33).

(60) In support of their notification, the Greek authorities cite the conclusions of the Transport Council of 16 October 2001, but the Commission notes that these are only political guidelines and are not legally binding when assessing the compatibility of aid with the Treaty. Furthermore, even though in paragraph (7) of these conclusions the Council called on the Commission, for the period after 14 September 2001, to examine 'on a case-by-case basis the compensation which could be granted on the basis of objective criteria to make up for restrictions imposed to European airlines by the country of destination', it also indicated that 'any aid or compensation may not lead to distortion of competition between operators'. In the context of assessing the equal treatment of operators, which it has to ensure, the Commission notes that no other proposal concerning the days following 14 September 2001 has been accepted for air carriers in other Member States.

Aegean Cronus

(61) As regards AC, the Commission notes that Greece has never tried to provide even the slightest information justifying the payment. The Commission therefore has not received, despite its requests, any information enabling it to confirm the compatibility of this aid with the Treaty. Moreover, the Commission notes that in their notification the Greek authorities indicated that the company did not operate transatlantic flights; the Commission therefore finds it unlikely that the above-mentioned necessary direct relationship between the cost eligible for compensation and the closure of airspace, provided for in the Communication of 10 October 2001, can be substantiated in the case of AC. The Commission therefore comes to the conclusion that this aid is incompatible with the Treaty and requests its repayment.

6. CONCLUSIONS

(62) In consequence of the above, the Commission finds that Greece has illegally implemented the aid scheme in question in breach of Article 88(3) and concludes that the measure is partially incompatible with the Treaty, particularly with Article 87(2)(b), as interpreted in the Communication of 10 October 2001,

HAS ADOPTED THIS DECISION:

Article 1

The state aid implemented by Greece in favour of Olympic Airways for losses sustained by this air carrier due to the partial closure of airspace after the attacks of 11 September 2001 is compatible with the common market as regards the compensation paid for the days from 11 to 14 September 2001, up to the maximum amount of GRD 668 783 057 (about EUR 1 962 680).

Article 2

The state aid implemented by Greece in favour of Olympic Airways for losses sustained by this air carrier due to the partial closure of airspace after the attacks of 11 September 2001 is incompatible with the common market as regards the compensation paid for the period following 14 September 2001. According to the notification submitted by Greece, this compensation amounts to GRD 976 216 943 (about EUR 2 864 907).

Article 3

The state aid implemented by Greece in favour of Aegean Cronus for losses sustained by this air carrier due to the partial closure of airspace after the attacks of 11 September 2001 is incompatible with the common market. According to the notification submitted by Greece, this compensation amounts to GRD 47 900 000 (about EUR 140 572).

Article 4

1. Greece shall take all necessary measures to recover from the beneficiaries the aid referred to in Articles 2 and 3, which was unlawfully made available to them.

2. Recovery shall be effected without delay and in accordance with the procedures of national law provided that they allow the immediate and effective execution of the decision. The aid to be recovered shall include interest from the date on which it was at the disposal of the beneficiaries until the date of its recovery. Interest shall be calculated on the basis of the reference rate used for calculating the grant equivalent of regional aid.

Article 5

Within 2 months of the date on which this Decision is notified, Greece shall inform the Commission of the measures taken to comply with it.

Article 6

This Decision is addressed to the Hellenic Republic.

Done at Brussels, 26 April 2006.

For the Commission
Jacques BARROT
Vice-President

A. LEGISLATION

Treaty on the Function of the European Union ("TFEU")

(extracts)

SECTION 2
AIDS GRANTED BY STATES

Article 107
(ex Article 87 TEC)

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.

2. The following shall be compatible with the internal market:
   (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
   (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
   (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
3. The following may be considered to be compatible with the internal market:
   (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation;
   (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
   (c) aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;
   (d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
   (e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

Article 108
(ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such

a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [NB: now article 108 TFEU]

(extracts)

CHAPTER II
PROCEDURE REGARDING NOTIFIED AID

Article 2

Notification of new aid

1. Save as otherwise provided in regulations made pursuant to Article 94 of the Treaty or to other relevant provisions thereof, any plans to grant new aid shall be notified to the Commission in sufficient time by the Member State concerned. The Commission shall inform the Member State concerned without delay of the receipt of a notification.

2. In a notification, the Member State concerned shall provide all necessary information in order to enable the Commission to take a decision pursuant to Articles 4 and 7 (hereinafter referred to as "complete notification").

[…]

Article 7

Decisions of the Commission to close the formal investigation procedure

1. Without prejudice to Article 8, the formal investigation procedure shall be closed by means of a decision as provided for in paragraphs 2 to 5 of this Article.

2. Where the Commission finds that, where appropriate following modification by the Member State concerned, the notified measure does not constitute aid, it shall record that finding by way of a decision.

3. Where the Commission finds that, where appropriate following modification by the Member State concerned, the doubts as to the compatibility of the notified measure with the common market have been removed, it shall decide that the aid is compatible with the common market (hereinafter referred to as a 'positive decision`). That decision shall specify which exception under the Treaty has been applied.

4. The Commission may attach to a positive decision conditions subject to which an aid may be considered compatible with the common market and may lay down obligations to enable compliance with the decision to be monitored (hereinafter referred to as a 'conditional decision`).

5. Where the Commission finds that the notified aid is not compatible with the common market, it shall decide that the aid shall not be put into effect (hereinafter referred to as a 'negative decision`).

6. Decisions taken pursuant to paragraphs 2, 3, 4 and 5 shall be taken as soon as the doubts referred to in Article 4(4) have been removed. The Commission shall as far as possible endeavour to adopt a decision within a period of 18 months from the opening of the procedure. This time limit may be extended by common agreement between the Commission and the Member State concerned.

7. Once the time limit referred to in paragraph 6 has expired, and should the Member State concerned so request, the Commission shall, within two months, take a decision on the basis of the information available to it. If appropriate, where the information provided is not sufficient to establish compatibility, the Commission shall take a negative decision.

[…]

Article 25

Addressee of decisions

Decisions taken pursuant to Chapters II, III, IV, V and VII shall be addressed to the Member State concerned. The Commission shall notify them to the Member State concerned without delay and give the latter the opportunity to indicate the Commission which information it considers to be covered by the obligation of professional secrecy.

Article 26

Publication of decisions

1. The Commission shall publish in the Official Journal of the European Communities a summary notice of the decisions which it takes pursuant to Article 4(2) and (3) and Article 18 in conjunction with Article 19(1). The summary notice shall state that a copy of the decision may be obtained in the authentic language version or versions.

2. The Commission shall publish in the Official Journal of the European Communities the decisions which it takes pursuant to Article 4(4) in their authentic language version. In the Official Journal published in languages other than the authentic language version, the authentic language version will be accompanied by a meaningful summary in the language of that Official Journal.

3. The Commission shall publish in the Official Journal of the European Communities the decisions which it takes pursuant to Article 7.

4. In cases where Article 4(6) or Article 8(2) applies, a short notice shall be published in the Official Journal of the European Communities.

5. The Council, acting unanimously, may decide to publish decisions pursuant to the third subparagraph of Article 93(2) of the Treaty in the Official Journal of the European Communities.

B. CASE-LAW

- Judgment of 26 September 2002, *Spain v European Commission*, C-351/98, EU:C:2002:530

"*53. The Commission is, however, bound by the guidelines and notices that it issues in the area of supervision of State aid where they do not depart from the rules in the Treaty and are accepted by the Member States (Case 310/85 Deufil v Commission [1987] ECR 901, paragraph 22; Case C-313/90 CIRFS and Others v Commission [1993] ECR I-1125, paragraph 36; and Case C-311/94 IJssel-Vliet [1996] ECR I-5023, paragraph 43).*"

- Judgment of 15 June 2005, *Olsen v European Commission*, T-17/02, EU:T:2005:218

"72. Pursuant to Article 230(5) EC [NB: now Article 263(6) TFEU], *proceedings for annulment must be instituted within two months. This period runs from the date of publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.*

73. It is clear simply from the wording of that provision that the criterion of the day on which a measure came to the knowledge of an applicant, as the starting point of the period prescribed for instituting proceedings, is subsidiary to the criteria of publication or notification of the measure (see the judgments in Germany v Council, cited in paragraph 66 above, paragraph 35, and in Case T-190/00 Regione Siciliana v Commission [2003] ECR II-0000, paragraph 30, and the case-law cited). It is also apparent from the case-law of the Court that, failing publication or notification, it is for a party who has knowledge of a decision concerning it to request the whole text thereof within a reasonable period but, subject thereto, the period for bringing an action can begin to run only from the moment when the third party concerned acquires precise knowledge of the content of the decision in question and of the reasons on which it is based in such a way as to enable it to exercise its right of action (judgments in Case 236/86 Dillinger Hüttenwerke v Commission [1988] ECR 3761, paragraph 14, and in Case C-309/95 Commission v Council [1998] ECR I-655, paragraph 18).

74. Pursuant to that provision, notification is the operation by which the author of a decision of individual relevance communicates the latter to the addressees and thus puts them in a position to take cognisance of it (see, to that effect, the judgments in Case 6/72 Europemballage and Continental Can v Commission [1973] ECR 215, paragraph 10, and in Case T-338/94 Finnboard v Commission [1998] ECR II-1617, paragraph 70). That interpretation also derives from Article 254(3) EC [NB: now Article 297(2) TFEU], *under which decisions shall be notified to those to whom they are addressed and shall take effect upon such notification.*

75. In the present case, the Kingdom of Spain is the sole addressee of the contested decision, which was notified to it by a letter from the Vice-President of the Commission dated 25 July 2001.

76. Since the applicant is not the addressee of the contested decision, the criterion of notification of the decision is not applicable to it (see, to that effect, the judgment in Commission v Council, cited in paragraph 73 above, paragraph 17). In any event, even supposing that a decision can be notified to a person who is not the addressee thereof, pursuant to Article 254(3) EC it has to be found that the decision contested in the present case was not notified to the applicant. In that regard, it must first be stated that, by indicating expressly in its e-mail of 27 September 2001 that the e-mail in question did not in any case constitute a formal commitment on its part, the Commission refused to guarantee to the applicant that the document attached thereto corresponded to the decision notified to the Spanish authorities. That e-mail therefore did not enable the applicant to have precise knowledge of the content of the contested decision and of the reasons on which it is based in such a way as to enable it to exercise its right of action. Hence, it cannot be considered as constituting notification to the applicant within the meaning of Article 230(5) EC (see, to that effect, the judgment in Case 76/79 Könecke Fleischwarenfabrik v Commission [1980] ECR 665, paragraph 7). It must then be stated that the e-mail in question, to which was attached an undated and unsigned copy of the letter addressed to

the Spanish authorities on 25 July 2001, and from which confidential information had been removed, was not sent directly to the applicant itself but to its lawyer.

77. With regard to measures which, in accordance with the established practice of the institution concerned, are published in the Official Journal of the European Union, although such publication is not a condition of their applicability, the Court of Justice and the Court of First Instance have recognised that the criterion of the day on which a measure came to the knowledge of an applicant was not applicable and that it was the date of publication which marked the starting point of the period prescribed for instituting proceedings (see, with regard to Council measures embodying the conclusion of international agreements binding on the Community, the judgment in Germany v Council, cited in paragraph 66 above, paragraph 39, and with regard to Commission decisions terminating a procedure for the review of aid under Article 88(2) EC, the judgment in BAI v Commission, cited in paragraph 67 above, paragraph 36). In those circumstances, the third parties involved can legitimately expect the decision in question to be published."

———